United Nations A/C.6/52/SR.16

General Assembly
Fifty-second session

Official Records

Distr.: General
12 November 1997

Original: English

Sixth Committee

Summary record of the 16th meeting
Held at Headquarters, New York, on Monday 27 October 1997, at noon.

Chairman: Mr. Tomka ..... (Slovakia)

Contents

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of the publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

97-82304 (E)

The meeting was called to order at noon.

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session (A/52/10)

1. **Mr. Pellet** (Chairman of the International Law Commission), introducing the report of the International Law Commission on the work of its forty-ninth session (A/52/10), said that he would first make some general remarks on the work of the Commission and its interaction with the Sixth Committee.

2. On the occasion of the Commission's fiftieth anniversary, which would be celebrated in the next few days, its work, accomplishments, failures and future mission would be thoroughly scrutinized by scholars, legal advisers and other experts. That was to be expected, since in order to remain relevant, institutions must comprehend the realities in which they operated and determine the needs of their "clients". In the Commission's case, those "clients" were States, whose collective voice was, or should be, the Sixth Committee. In order to meet the needs of States, however, the Commission had to know what they were and to be given guidelines as clear and precise as possible.

3. As an academic expert, and not a government representative, he considered it his duty to speak frankly. The Commission often had the impression that the Committee did not always discharge its role of guidance and leadership properly. To be sure, it criticized the Commission's work, and when the criticism was well thought out, it was accepted with gratitude. Nevertheless, the criticism often did not lead to clear or constructive guidelines. All too frequently, the Commission received no reply to the questions that it put to the Committee, although it had endeavoured to make its questions increasingly clear and precise. Governments individually seldom made the comments that the Commission hoped for on draft articles that had been in preparation for a long time. To date, for example, just one State had submitted its comments to the Secretariat on the draft articles on State responsibility, which had been adopted on first reading in 1996. Only two States had reacted to the 1996 report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, a topic whose political and economic implications were such that it was practically impossible for the Commission to conclude its work without precise guidelines from the Committee. On the subject of reservations to treaties, 31 States had transmitted replies to the questionnaire which he had drawn up two years earlier. While he was grateful for their generally interesting and valuable comments, he could not help noting that 31 out of the 185 States Members of the Organization was not exactly an impressive figure.

4. The Commission had in accordance with the wishes expressed by the Committee, undertaken to reconsider its working methods. That process, which the year before had resulted in a detailed report containing specific proposals that had been well received by the General Assembly, was beginning to bear fruit. However, the Commission could not by itself reform the way it prepared its drafts, any more than it could respond by itself to the wish expressed in Assembly resolution 51/160 for the Commission's dialogue with the Sixth Committee to be improved.

5. It was particularly important for government officials to study the Commission's reports carefully, consider the suggestions made in them and take positions at an early stage of work on a topic, at a time when policy issues were being formulated and before the basic structure of any legal instrument had been decided on. Even if States, when they could not agree, had to ask the Commission to submit alternative proposals in the form of optional draft articles, its output would be more polished and more useful to the international community as a result.

6. Mention should also be made of the concerns which the Commission's members had begun to feel since reading the Secretary-General's most recent report on reform of the Organization (A/51/950). It was striking that the Secretary-General was not planning any reform in the development and application of the norms of international law. While the Commission had nothing to be ashamed of in that area, it believed that the time had come to think about adaptations and reforms that might enhance its effectiveness. He had written to the Secretary-General on that subject, and was convinced that the Commission's fiftieth anniversary could and should be an occasion not only for deep thought about that issue, but also for specific reform proposals.

7. In that connection, he drew attention to the 1996 report of the Planning Group of the Enlarged Bureau on the Commission's programme, procedures and working methods (A/51/10, paras. 141-251), which had been endorsed by the Commission as a whole. Implementing the recommendations contained in the report was chiefly the responsibility of the Commission itself; however, it needed the help and support of the Committee, which alone could amend the Commission's statute. While amending the statute was not necessarily a priority, it might be an appropriate means of addressing some issues, such as the way the Commission elected its members. The elections held in 1996 had resulted in the Commission having 18 new members out of 34. Despite the adaptability and spirit of cooperation shown by both the newcomers and the long-time members, such abrupt

changes in the Commission's composition adversely affected the continuity of its work. It would be useful and timely to think about methods of election that could result in a "gentler" change in membership, particularly as the next statutory renewal was four years away.

8. Another problem was the fact that no woman had ever been elected to the Commission in the 50 years of its existence. The reasons for that situation were complex; ways of remedying it were far from obvious, and would doubtless depend more on political will than on the adoption of legal measures. The Committee could, however, anticipate some regulatory measures that would at least be an incentive and might even be compulsory in nature.

9. The Commission's 1997 report comprised fewer than 160 pages. While rather small in comparison with the average size of previous years' reports it was in keeping with the resolutions adopted by the Commission in 1996. The questions posed to Governments in the report addressed the fundamental aspects of two new topics and the reworking of an old topic. The Commission had also presented a complete set of draft articles on the nationality of natural persons in relation to the succession of States, on which it sought comments from Governments. The Preliminary Conclusions of the Commission on reservations to normative multilateral treaties, including human rights treaties, required careful consideration. In addition, since 1997 was the first year of the quinquennium, the Commission had drawn up a work schedule for the remainder of the period.

10. Turning to the overall structure of the report, he outlined the contents of each of the 10 chapters, dwelling particularly on chapter X – the traditional chapter on other decisions and conclusions of the Commission – since it most closely reflected the general concerns that he had expressed. In 1997 the Commission had focused its attention more on implementing the decisions and guidelines it had adopted the previous year than on adopting new ones. In that context, he drew the Committee's attention to paragraphs 222 to 224 of the report, on methods of work. He also noted that the Commission had endeavoured, if not to take a new approach to its relationships with other bodies, at least to strengthen them. The most spectacular evidence of that had been the invitation to Judge Schwebel, President of the International Court of Justice, to visit the Commission. Judge Schwebel had accepted the invitation, although in the event he had been represented by Judge Shi, with whom the Commission had had a fruitful exchange of views. It had also enjoyed its customary contacts with members of the legal services of the International Committee of the Red Cross, the Inter-American Juridical Committee, the Asian-African Legal Consultative Committee and the Council of Europe. It had also been pleased to receive a visit from the Secretary-General.

11. Pursuant to decisions taken in 1996, the Commission had decided to involve more of its members in the inter-sessional work of the special rapporteurs. Three of the new special rapporteurs had opted for the establishment of a consultative group consisting of members of the Commission who would assist them in the preparation of their reports. The members of the consultative group would exchange ideas and would help the special rapporteurs shape policies on the issues associated with their topics. With regard to the fourth topic, State responsibility, the Commission had decided to establish working groups to deal with the more sensitive problems.

12. The never-ending, recurrent problem of a starting date for the session had once more been the subject of sharp debate. He drew attention to paragraph 226 of the report, which made clear the constraints under which the Commission was operating; the experiment of the split session arrangement was not being made under the best conditions. Similarly, the 10-week session in 1997 should remain an "exceptional measure", an 11-week session should be held in 1998 and a 12-week session in 1999, so that the Commission could deal with the many complex topics on its agenda.

13. He drew attention to the seminar, mentioned in paragraphs 229 and 230, to celebrate the Commission's fiftieth anniversary. Paragraphs 247 to 258 described the thirty-third session of the International Law Seminar, which had been attended by 22 participants of different nationalities, mostly from developing countries. Seminars were a "sideline" activity of the Commission, but he was very much in favour of them, since they provided a unique opportunity for young scholars and junior government officials to become familiar with the work of the Commission and many international organizations. It was therefore very important to try to raise the level of participants – which could be uneven – and endeavour to offer adequate financing. The Commission thanked Governments that had contributed to the United Nations Trust Fund for the International Law Seminar.

14. Lastly, he drew the Committee's attention to chapter III, entitled "Specific issues on which comments would be of particular interest to the Commission". It had been prepared in response to the request in General Assembly resolution 51/160 and was intended to help Governments identify some of the important policy issues underlying a particular topic. The Commission was most anxious to hear the views of the Committee and of Member States on those and other topics.

15. **Mr. Cede** (Austria) said that a careful reading of chapters III and X of the report of the International Law Commission, on which he would concentrate his remarks, showed that the Commission was fully committed to playing its part in the reform of the codification process within the United Nations system. He expressed appreciation for the arrangement of chapter III. The list of issues implicitly suggested a structure for the comments to be made by States and clearly set out such aspects of the Commission's work as called for political decisions. The "question and answer" pattern was itself an effective mechanism for activating dialogue between States and the Commission. An explanation of State practice and customary law on given questions was very much needed.

16. Chapter X, with its stringent programme of work and its ambitious timetable, also testified to the eagerness of the Commission, in its new composition, to carry out its mandate with energy. He hoped that, in view of the Commission's heavy workload, the schedule could be kept.

17. The Commission had demonstrated its readiness for reform in 1996, developing a set of general conclusions and recommendations designed to give a new impetus to its work, which his delegation had wholeheartedly supported. Some of those had related to the necessary interaction between the Commission, as a body of independent legal experts, and the Committee, as a body of government representatives. The two formed a tandem whose proper functioning was of the utmost importance for the advancement of codification and the progressive development of international law within the United Nations system. The new dynamic in the working methods of the Commission had no parallel as yet in the Committee, which should consider some structural reforms of its own. He therefore trusted that he might make a few suggestions which were neither original nor radical, but contained elements that merited serious consideration.

18. First, rather than retaining the tradition whereby delegations made oral statements, which in fact were often accompanied by written versions handed out during the debate and which were generally lengthy, sometimes technical and often resembled academic lectures, the Committee could achieve true dialogue by encouraging delegations to structure their statements to be as concise as possible, stressing the key legal positions of their Governments on the topic under consideration and leaving it to a written memorandum to outline the legal points in greater detail. Such written presentations could be circulated simultaneously with the oral intervention. The advantages seemed obvious. Precious time would be saved and the oral statements would be more user-friendly, in that in a short and well-focused statement the relevant State position could be easily identified.

19. Secondly, in order to stimulate real discussion, a less formal set-up for open exchanges among State representatives might be envisaged, open to all delegations. Such consultations, to which sufficient time should be allotted, could take place under the authority and leadership of the Chairman of the Committee.

20. His third suggestion was to establish a rule that, whenever a topic was under discussion directly involving a particular member of the Commission, that member should be available during the consideration of the relevant issue, so as to allow the Committee to receive clarification direct from a current member of the Commission. That would appear to be a matter of common sense. Such a procedure would, of course, have to be placed in the context of the possible restructuring of the proceedings of the Committee along the lines described above. An exchange of views between the Committee and the relevant members of the Commission could not fit into the current format of delegates reading out their statements.

21. With regard to the split session for 1998, it was regrettable that, although the experiment might prove worthwhile, the large number of conferences to be held in 1998 did not allow for sufficient flexibility for scheduling Commission sessions. As for cooperation with other bodies, his delegation commended the Commission for having expanded its contacts with learned societies all over the world; it looked forward to a further intensification of contacts that could streamline the codification process and thereby avoid duplication of work.

22. Lastly, with regard to the establishment of consultative groups to assist the special rapporteurs in their tasks, he said that, although in the real world there might be a danger of potentially divergent views within such groups, the advantages outweighed the disadvantages overall, since consultative groups made it possible to make better use of the available resources and facilitate a sharing of responsibility within a collegiate body of proven experts in the field.

23. **The Chairman** noted that the Commission had made substantial progress on two topics and had held valuable discussions on the others. He trusted that the colloquium to be held the next day would be a suitable forum for informal exchanges on all those topics and that the role of the Committee and of States as well as that of the Commission would be considered.

The meeting rose at 1 p.m.

United Nations A/C.6/52/SR.17

General Assembly
Fifty-second session

Official Records

Distr.: General
19 November 1997

Original: English

Sixth Committee

Summary record of the 17th meeting
Held at Headquarters, New York, on Thursday, 30 October 1997, at 10 a.m.

Chairman: Mr. Tomka ..... (Slovakia)

Contents

Visit by the President of the International Court of Justice

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session *(continued)*

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

97-82388 (E)

The meeting was called to order at 10.10 a.m.

Visit by the President of the International Court of Justice

1. **The Chairman** welcomed Judge Stephen Schwebel, President of the International Court of Justice and a former member of the International Law Commission.

2. **Mr. Schwebel** (President of the International Court of Justice) said that the International Court of Justice had been busier in recent years than ever before in its 50-year history. It currently had eight cases on its list, which was not as modest as it sounded, since only States could be parties to contentious cases before the Court. The potential pool of litigants thus did not exceed 190. In addition, the United Nations and its specialized agencies were entitled to request advisory opinions of the Court. The most recent and important of the 23 opinions requested over the years was the Court's 1996 opinion in response to a question of the General Assembly on the legality of the threat or use of nuclear weapons. The docket of the Court was also limited because the parties had to agree to the Court's jurisdiction, which, in many international legal disputes, they did not. Nevertheless, the Court's current docket was substantial, consequential and broad.

3. The *Qatar* v. *Bahrain* case concerned the resolution of territorial claims and the limitation of maritime boundaries. The cases brought by the Libyan Arab Jamahiriya against the United Kingdom and the United States dealt with the applicability of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the Libyan effort to interdict sanctions imposed by the Security Council because of its alleged involvement in the Lockerbie atrocity. They raised questions concerning the powers of the Security Council in relation to the treaty rights of a party to a multilateral treaty, and questions concerning extradition and terrorism. The Court had recently concluded hearings on jurisdiction and admissibility in both cases. The *Oil Platforms* case concerned claims by the Islamic Republic of Iran that United States attacks on Iranian oil platforms during the war between Iraq and Iran had violated the Iran/United States Economic Relations Treaty of Amity, Commerce and Consular Rights, raising questions not only of treaty interpretation but also of aggression, self-defence, neutrality and the law of war. Another major case before the Court was that of Bosnia and Herzegovina against Yugoslavia, in which it was claimed that the alleged promotion of "ethnic cleansing" by the Federal Republic of Yugoslavia in Bosnia was a violation of the Convention on the Prevention and Punishment of the Crime of Genocide. The case between Cameroon and Nigeria concerned title to the Bakassi peninsula, as well as problems concerning the length of the boundary between the two States. There was also a case concerning Canada's seizure of a Spanish fishing vessel on the high seas in an area in which Canada claimed the right to take protective measures to preserve fish stocks. The most recent case, brought by special agreement between Botswana and Namibia, concerned title to a fluvial island.

4. The geographical spread of the parties currently before the Court was gratifying. It compensated somewhat for the relatively low number of States — 60 — accepting compulsory jurisdiction under the optional clause.

5. In 1996, the Court had issued judgments upholding jurisdiction in the *Oil Platforms* case and the *Genocide* case, and had issued an Order for provisional measures in the *Land and Maritime Boundary* case brought by Cameroon against Nigeria. It had also rendered two advisory opinions, one finding that the World Health Organization lacked authority to request an advisory opinion on the legality of the use of nuclear weapons, and the other dealing with the complex and portentous question of the legality of the threat or use of nuclear weapons. In 1997, the Court had been fully occupied for most of the year with the complex *Gabčikovo-Nagymaros* case, on controversial dam locations, brought by special agreement between Hungary and Slovakia. Judgment had been given on 25 September.

6. The Court was clearly very active, and yet, like the United Nations, it was suffering from financial deprivation. Its budget, of less than $11 million a year, funded entirely by the United Nations, was a minute and diminishing proportion of the Organization's budget. At a time when the international community had launched three new international courts and was considering establishing a fourth, it needed to fund adequately the supreme judicial organ of the United Nations, the International Court of Justice. The Court was working with the Secretary-General, the Advisory Committee on Administrative and Budgetary Questions and the Fifth Committee to mitigate its severe financial difficulties. If the Court were more adequately funded, it would be able to deal more effectively with the backlog in publications of judgments and advisory opinions and of pleadings, and with the shortage of staff, which affected all aspects of its work. In particular, the Registry had only a small legal staff, and, despite significant economies achieved by having only two official working languages (English and French), the translation staff was inadequate for the demands placed on it.

7. Such factors affected the productivity of the Court, although the perception that cases took a long time to come to judgement was not always based on a sound analysis of the process involved. States parties to a case before the Court engaged in meticulous preparation of their pleadings, typically requiring many months to review their own and the other party's pleadings. In cases brought by application, for example, the average time limit for filing the memorial and counter-memorial was one and a half years. In exceptional cases, such as the Lockerbie cases, it could take as long as three years, at the request of the parties. The process could be further prolonged if there were preliminary objections to jurisdiction, and requests for extensions of time limits for filing were not uncommon. States, of course, had a sovereign right to present their case as they saw fit, and counsel and advisers had a professional obligation to be extremely thorough in their presentation, as a court of 15 or more judges could be impressed, sometimes unpredictably, by a spectrum of different arguments. Such thoroughness, coupled with technological advances and ease of document reproduction, might explain the large volume of pleadings and documentary annexes the Court had to translate, examine and digest.

8. In cases begun by application, the Rules of Court provided for the consecutive filing of a memorial by the applicant and a counter-memorial by the respondent. Almost invariably, a reply and rejoinder were also scheduled. In cases begun by a special agreement, the Court would normally sanction whatever filings the parties had agreed on. In the absence of agreement, each filed a memorial, simultaneously, followed by a simultaneous counter-memorial. Replies were also usually authorized by the Court, resulting in six written pleadings, which inevitably lengthened the whole process, increased the workload of the Court and Registry, and complicated the task of the States themselves. Moreover, as parties did not always reveal their arguments completely at the memorial stage, a third round of written pleadings was often inevitable.

9. Translation was another vital factor. Each member of the Court had the statutory right to work in either English or French, and, in the interests of equality, all pleadings and documents had to be translated from one into the other, except in the rare cases where parties filed pleadings in both languages. Moreover, the pace of work of the Court depended on the ability of members, for some of whom neither French nor English was their native language, to follow proceedings in those languages. In the recent *Gabčíkovo-Nagymaros* case, pleadings and documents amounted to some 5,000 pages. Even with outside help, the underfunded translation service took a considerable time to produce adequate translations. Nor could much be done in the way of advance preparation, since the sparing use of translation resources meant devoting them to the next case to be heard.

10. The Court's practice had been to hear cases, as far as possible, in the order in which they were instituted. The resources available dictated that the Court would normally handle the active phase of hearing and deliberation in only one case at a time. Allowing for provisional measures and other urgent matters, it did happen that written pleadings in a case closed long before a date could be set for oral hearings, occasioning some comment. However, it was not always possible to bring forward the oral hearings or to reschedule a case to take the place of one which had been withdrawn or settled. Parties insisted upon adequate time to prepare, and the Court could not force them to appear at a time that suited the Court. During apparent lacunae in the Court's schedule, the Court was actually fully occupied dealing with pleadings, procedural matters in other pending cases and administrative matters. All the Court's cases were at different procedural stages; none of them was currently dormant.

11. At the same time, the Court's methods of work were not swift. They had been designed to enable a universal court, representing the principal legal systems of the world, to deal with cases in such a way as to reflect the views of 15 judges. The methods of work were effective, but there was room for a procedural review to enhance the Court's productivity, without impairing the quality of its judgments. The Court had already begun to give serious attention to that complex problem, and some progress had been achieved.

12. With regard to the hearings, the oral phase itself was not unduly long. Once the case had been heard, the Court focused on producing a judgment as rapidly as was compatible with the interests of justice, and in accordance with the rules established by the Resolution on the Internal Judicial Practice of the Court, which was structured so as to permit each member to participate in the deliberative process on an equal footing. After the close of oral arguments, agreement was reached on the issues on which decisions were required, and each judge drew up a note in one of the Court's official languages, analysing the issues of the case and his provisional solution to them. Those notes, which taken together generally ran to hundreds of pages, were then translated into the other official language and distributed to the other judges for their consideration. In order to preserve the confidentiality of deliberations, notes were later destroyed and one copy was left on registry files, to which not even judges could have access. The notes phase was followed by an in-depth deliberation, at which each judge

spoke in turn. Once a majority had agreed on the points to be decided, a drafting committee was elected from among the members of that majority.

13. A first draft of the judgment was then produced in both languages and circulated for comment. Written amendments were submitted for inclusion in the drafting committee's revised draft for the first reading, which was conducted by the full Court, examining the text line by line. The drafting committee then produced a revised text, which was given a second reading and formally adopted in its final form by he Court.

14. Judges wishing to append separate or dissenting opinions had to prepare them in the same time-frame as the judgment. Their full participation in discussions ensured that the judgment was the judgment of the whole Court, while the drafting committee could take separate and dissenting opinions into account in its revision of the draft judgment for the second reading. The Resolution on Judicial Practice provided an essential mechanism to impose discipline in that process.

15. Although time-consuming, the step-by-step procedure was clearly structured, ensuring equality of participation for all members and safeguarding the forward momentum of the work.

16. He did not wish to suggest that the way the Court worked could not be improved. But he hoped that he had conveyed a sense of the care which the Court took in carrying out its responsibilities.

17. **The Chairman** said that it was encouraging to note the truly universal nature of the jurisdiction of the International Court of Justice, particularly since it was only very recently that a region had been reluctant to recognize it. Efforts to increase the efficiency and effectiveness of the Court were ultimately a matter for the Court itself to discuss and decide on. However, the fact that the Court, as the highest judicial body of the United Nations, received only 1 per cent of the United Nations budget was cause for concern. If the Court's effectiveness was to be enhanced, it would need the support and financial backing of all States Members of the United Nations.

18. **Mr. Tankoana** (Niger), referring to Article 94 of the Charter of the United Nations, asked the President of the International Court of Justice to explain what the Court could do to ensure compliance with its judgments where parties brought a special case before it, but might or might not enjoy the veto in the Security Council.

19. **Mr. Schwebel** (President of the International Court of Justice) said that where parties to a dispute agreed to bring a special case before the International Court of Justice, it was legally beside the point whether they explicitly agreed to be bound by the Court's judgment, since Article 94 of the Charter indicated that the Court's judgments were binding on Member States. That Article, which provided that a party might have recourse to the Security Council to give effect to the judgment of the Court, had rarely been invoked for a number of reasons, including the veto. However, given the change in the political climate over the past decade, Article 94 might become effective. While it was true that the Court had no power to enforce its judgments, there was a very high rate of compliance, even in the case of judgments that were very painful to certain parties.

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session *(continued)* (A/52/10)

20. **Mr. Sepulveda Amor** (Mexico) said that his delegation welcomed the report of the International Law Commission, including its chapter III, entitled "Specific issues on which comments would be of particular interest to the Commission". It hoped that a similar chapter would appear in future reports.

21. The draft articles on nationality in relation to the succession of States and the commentaries to them (A/52/10, chap. IV) were well balanced and would contribute to the standardization of rules on that topic. Of particular merit was the inclusion of the principles on recognition of the right to a nationality in the context of the succession of States. His delegation also considered that respect for the will of persons concerned, reflected in draft article 10, provided a desirable complement to the rules laid down in the draft articles. The application of the principle of effective nationality on the basis of a real connection — the principal criterion being habitual residence — should also help to resolve many of the problems arising from the succession of States. Its importance in international law was such that it had been essential to recognize the principle in the draft articles. No doubt there were other criteria that could be taken into account in determining nationality, in keeping with the circumstances of each case. Given the various forms that the succession of States could take, the Commission had acted wisely in elaborating specific rules for each category of succession, whether it involved the unification or dissolution of States or the transfer or separation of part of their territory. It was, however, worth stressing that the draft articles applied to the effects of a succession of States occurring in conformity with international law only and for that reason it was important to retain draft article 27, in order to underline the fact that the draft articles did not apply to

acts prohibited by law, such as military occupation or the illegal annexation of a territory. Lastly, the draft articles should contain rules on succession as it affected the nationality of legal persons and he hoped that the Commission would consider the latter two issues further.

22. The topic of reservations to treaties merited particular attention (A/52/10, chap. V). However, the submission of preliminary conclusions might be considered premature at such an early stage of the discussions. His delegation would have preferred a wider exchange of views between the Commission and States before the submission of what was, of necessity, a partial view. The preparation and consideration of two reports remained pending for 1998: one on the definition, formulation, withdrawal and acceptance of reservations and objections to reservations and the other on the effects of reservations, the acceptance of reservations and objections to reservations. Other reports ought to be prepared before the first reading in 2000. Breaking up the pieces of a mosaic that should be seen as a whole could lead to a distorted picture.

23. With regard to the substance of the preliminary conclusions, his delegation considered that, in view of the universality of a large number of international instruments drawn up under the Vienna Conventions on the Law of Treaties of 1969 and 1986, the flexibility of the reservations regime in those Conventions should be retained and applied to all treaties, regardless of their nature. Special arrangements for particular issues were not appropriate.

24. It was for States parties to decide on the admissibility of reservations to a given instrument. The monitoring bodies set up under some agreements could not oppose or counteract the essence of the commitments made by a State party in expressing its consent to be bound by a treaty. A monitoring body could not and should not be a substitute for Governments, nor could it pronounce on the nature and the scope of a State's obligations. In the event of a dispute it was for the competent legal bodies to assess and decide on the permissibility of a given reservation.

25. Of the 12 preliminary conclusions, only the first three were unquestionable; the other nine were open to dispute. The conclusions should, therefore, be reviewed and in many cases reformulated. While a monitoring body could draw attention to a specific reservation, it should not be involved in the formulation of commentaries or recommendations on the admissibility of the reservation in question.

26. With regard to State responsibility (A/52/10, chap. VI), his delegation stressed the importance of the Commission's work plan for the quinquennium. Discussions should be stepped up so that draft articles could be adopted on second reading before the mandate of current members of the Commission had ended. To that end States should establish close communication with the Commission, while the Commission should address the concerns of Governments.

27. His delegation welcomed the Commission's decision to continue studying the topic of international liability for injurious consequences arising out of acts not prohibited by international law (A/52/10, chap. VII). There was a growing need for clear rules limiting the nature of the discretion with which States interpreted and complied with certain obligations, especially those aimed at ensuring that activities carried out in areas under their jurisdiction or control did not cause damage to other States or to areas beyond the limits of their national jurisdiction. It was regrettable that only modest advances and been made, owing to the reluctance of States to contribute to the definition of the scope of a regime of liability for such activities. Principle 22 of the Stockholm Declaration — reflected in many later international instruments — imposed on States the obligation to cooperate in developing that area of law. Steps should be taken to put that obligation into effect. The Commission's agreement to continue its work on the topic was welcome, but an integrated approach would be preferable. The question of compensation or other forms of reparation for the adverse effects of transboundary damage as a result of activities covered by the draft articles should be given pride of place, since it was fundamental to the draft. The current title of the topic accurately reflected its content and scope and there was no need to change it; any change should be made when the final form of the draft was known, not at the current stage of proceedings. With regard to draft articles 4, 6 and 9 to 19, on which the Commission had invited comments, his delegation attached importance to notification and prior consultation between the State under whose authority a hazardous activity was undertaken and the States that might be affected by such an activity, and also to the preparation of studies to consider the transboundary effect produced by a hazardous activity. Those issues should be given greater weight.

28. As to diplomatic protection (A/52/10, chap. VIII), his delegation endorsed the Commission's decision to limit its consideration to indirect harm, or harm to natural or legal persons whose case was taken up by a State. Of particular importance was the principle of the exhaustion of local remedies in the context of diplomatic protection. The draft articles should fully safeguard the exhaustion of local remedies as a precondition of the exercise of protection of its nationals by a State. Chapter three of the preliminary plan of work did not give sufficient attention to that; indeed, other

criteria tending to diminish its relevance were given more weight. The resulting imbalance should be corrected.

29. The Commission had rightly judged that it would be useful to consider at the initial stage the question of protection claimed by international organizations, for the benefit of their agents to determine whether such protection should be included within the scope of the articles. His delegation would await the Commission's proposals before stating Mexico's position on the matter. Meanwhile, there was surely no need to distinguish between international organizations and regional economic integration organizations. In addition, some issues such as the basis of diplomatic protection for legal persons, required clearer and more detailed definition. The same applied to the chapter on the consequences of diplomatic protection.

30. With regard to the unilateral acts of States (A/52/10, chap. IX), State practice was such that consideration of it would be useful, opportune and feasible. There was, indeed, a need to make a systematic formulation of the various principles and rules governing obligations and rights so as to define how such acts functioned and what their consequences were. His delegation took note of the outline for the study proposed by the Commission and the suggestion that it should be improved as work moved ahead. It also supported the idea that the study of unilateral acts by international organizations should form part of a future, separate analysis, since it was qualitatively different from the scope appropriate to States.

31. The Commission's work programme (1998-2001) would be difficult to carry out, in view of the number of items of wide scope and great complexity already before it and the limited length of its sessions, but the Committee could rely on its competence and dedication. Some topics merited priority attention, such as State responsibility and international liability for injurious consequences arising out of acts prohibited by international law. The work programme as it stood, did not seem to recognize the priority that should be given to those two topics. The Commission should approach the work programme flexibly, to enable it to conclude its work on some topics that had been on its agenda for several decades or ones whose importance was unquestionable. The topic of extraterritorial jurisdiction undoubtedly merited the attention of the Committee and the international community; the lack of clear and definite rules in that regard had already generated conflict and aroused controversy. The Commission was a suitable forum for working out principles on the limits of extraterritorial jurisdiction, and inclusion of the topic in the work programme would be beneficial to relations between States.

32. **Mr. Santaputra** (Thailand) expressed satisfaction with the Commission's adoption on first reading of the draft articles on nationality of natural persons in relation to the succession of States, which effectively met the pressing need to ensure greater judicial security for States and individuals: the articles addressed a wide array of concerns, such as transfer of part of the territory, unification of States, dissolution of a State, or separation of part of or parts of the territory. Questions of nationality in situations such as military occupation or illegal annexation of territory had been excluded, since such situations were in contravention of international law.

33. His delegation attached particular importance to the fundamental right of every person to a nationality, the core principle behind the draft articles, and to the prevention of statelessness, which the draft articles declared to be an obligation of all States. Respect for the will of persons concerned should also be taken into consideration. Furthermore, provisions on exchange of information, consultation and negotiation were desirable; such interaction could be helpful in preventing or remedying detrimental effects of succession and giving effect to the right to a nationality.

34. His delegation endorsed the approach taken in the draft articles on nationality with regard to unity of a family, which, rather than requiring all members of a family to acquire the same nationality, upheld the principle that acquisition or loss of nationality in relation to the succession of States should not undermine the unity of a family. The inclusion of draft article 12, relating to the nationality of children born after the succession of States, merited praise not only because it was consistent with other instruments relating to the rights of the child but also because it addressed lacunae in cases where parents died while the process of nationality approval was still pending.

35. His delegation supported the inclusion of legal persons in the draft articles on problems of nationality in the context of succession of States, since it would address potential problems arising from the fact that legal persons were playing an increasingly important role internationally and were developing closer relations with States.

36. The subject of reservations to treaties should be given serious attention, since it constituted one of the fundamental aspects of international law. The lacunae in the Vienna regime should be filled and its ambiguities relating to reservations should be removed, as far as possible within the framework of the Vienna Conventions, particularly with respect to the object and purpose of the treaty, which was

the principal criterion for determining the admissibility of reservations.

37. The problem of the definition of reservations and interpretative declarations merited more detailed study. His delegation therefore looked forward to receiving information from the Special Rapporteur and the Commission on their consideration of that topic. In the meantime, it took note of the Commission's preliminary conclusions on reservations to normative multilateral treaties, particularly subparagraphs 1, 2 and 7 (A/52/10, para. 157).

38. With regard to "State responsibility", he noted with satisfaction that the Commission planned to complete the second reading of the topic by the end of its quinquennium.

39. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he took note of the Working Group's findings that the scope and the content of the topic remained unclear due to such factors as conceptual and theoretical difficulties, appropriateness of the title and the relation of the subject to "State responsibility", and that the issues of prevention and of liability should be dealt with separately.

40. Concerning the topic of unilateral acts of States, he shared the Working Group's view that work on the codification and progressive development of the applicable legal rules was advisable and feasible, bearing in mind that States increasingly carried out unilateral acts with the intent to produce legal effects, and that the rule of law could be strengthened by an attempt to clarify the functioning of those kinds of acts and what the legal consequences were.

41. Turning to "Diplomatic protection", he said that the question of claims brought by States on behalf of their nationals against another State was acquiring greater significance with the increased exchange of persons and commerce across State lines. The scope of the topic should include not only natural and legal persons, but also ships, aircraft and spacecraft, which also held the nationality of a State. While further consideration should be given to the form which the outcome of the work on the subject should take, he believed that either a convention or guidelines would be appropriate.

42. With regard to international organizations, it was recognized that they were becoming increasingly entwined with States. Nevertheless, States and international organizations differed as to their nature and the type of diplomatic protection which they afforded. He therefore believed that, taking into account the relationship between the protection exercised by States and functional protection exercised by international organizations, the latter should be studied further.

43. **Mr. Suhendar** (Indonesia), recalling General Assembly resolution 51/160, in which the Assembly had invited the Commission to undertake a substantive study of the topic of nationality in relation to the succession of States and to give priority to the consideration of the question of the nationality of natural persons, agreed with the Commission that, although nationality was essentially governed by national legislation, in the specific context of a succession of States, international law had a significant role to play, as such a situation might involve a change of nationality on a large scale. It was important for the draft articles to reflect an appropriate balance of interests among the individuals and States concerned; he therefore hoped that the Commission's further work on the topic would help to fill the gaps in the existing law in that area.

44. With regard to the topic of reservations to treaties, he agreed that the Vienna regime should be preserved, as the rules which it contained could be regarded as having acquired a customary value. A guide to practice in respect of reservations would be useful to States in determining their practice on that question. Moreover, the proposed model clauses could serve as models for States and should be designed to keep possibilities of disputes to a minimum.

45. Turning to "State responsibility", he looked forward to completion of the work on the basis of the recommendation of the Working Group. The topic needed to be dealt with in a broader context, taking into account the interests of developing countries.

46. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he noted that the Commission's work took place in the context of the achievements of the United Nations Conference on Environment and Development.

47. With regard to "Diplomatic protection", he looked forward to the results of the study to be undertaken by the Commission. He also expressed appreciation for the work carried out thus far on the topic "Unilateral acts of States".

48. The recently concluded Colloquium on the progressive development and codification of international law was a source of satisfaction, as was the offer by the Government of Switzerland and the Graduate Institute of International Studies to organize a seminar in 1998 to celebrate the fiftieth anniversary of the International Law Commission. For developing countries in particular, the organization of seminars under the auspices of the Commission had proved

beneficial for students and professors of international law as well as government officials.

49. Lastly, he believed that cooperation between the Commission and the Asian-African Legal Consultative Committee should be strengthened, so that the views of non-aligned countries would be reflected in the development of the norms of international law.

50. **Mr. Tang Chengyuan** (Secretary-General of the Asian-African Legal Consultative Committee) said that the Asian-African Legal Consultative Committee (AALCC), greatly appreciated the role played by the Commission in the progressive development and codification of international law. At its inception, the Commission had included few representatives of African and Asian States; those States had therefore deemed it imperative to conduct a systematic examination of the rules of international law and to express their views on the subject through a competent forum. Accordingly, the main objective behind the establishment of AALCC had been to forge closer cooperation among African and Asian States and to create a regional forum in which to make their views known.

51. The activities and functions of AALCC, as envisaged in its statute, were centred on the consideration of legal problems referred to it by member Governments and on following up the work of the Commission and of the United Nations. In preparing detailed notes and comments on draft articles adopted by the Commission, the aim of AALCC was not to establish a separate system of international rules, but to promote general agreement on a just system of law reflecting the interests of the entire international community.

52. The Commission and AALCC had standing invitations to each other's sessions. In recent years, the Commission had also been represented at the meetings of legal advisers of States members of AALCC held in New York during sessions of the General Assembly. Many members of the Commission were also members of delegations attending AALCC sessions and thus monitored and reviewed the work of the Commission on more than one occasion. The links between the two bodies had been further strengthened when the General Assembly had accorded permanent observer status to AALCC and it had begun to be represented in the Sixth Committee during the consideration of the report of the Commission.

The meeting rose at noon.

United Nations A/C.6/52/SR.18

General Assembly
Fifty-second session

Official Records

Distr.: General
4 December 1997
English
Original: French

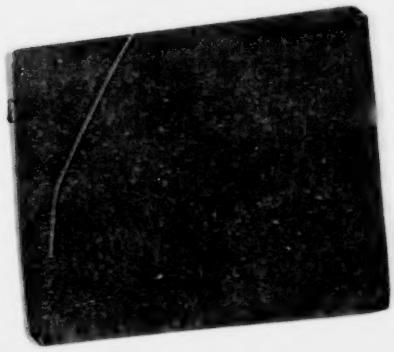
Sixth Committee

Summary record of the 18th meeting
Held at Headquarters, New York, on Thursday, 30 October 1997, at 3 p.m.

Chairman: Mr. Tomka ..... (Slovakia)

Contents

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session (*continued*)



This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

97-82412 (E)

The meeting was called to order at 3.10 p.m.

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session (*continued*) (A/52/10)

1. **Mr. Pellet** (Chairman of the International Law Commission), introducing chapter IV of the report of the International Law Commission (A/52/10), entitled "Nationality in relation to the succession of States", said that the Commission should be congratulated for having completed the first reading of the draft articles on the subject in a single session, a veritable tour de force of which the main architect was the Special Rapporteur, Mr. Mikulka.

2. In accordance with the plan of action adopted in 1996 and approved by the General Assembly, and without prejudice to the ultimate decision on the form which the draft articles should take, the Commission was submitting the draft articles in the form of a draft declaration. The text, which consisted of a preamble and 27 articles divided into two parts, had been the subject of a searching review and careful debate; it had been adopted without a vote, although some members of the Commission had expressed reservations on points of varying importance.

3. The provisions of Part I were general in scope, in the sense that they applied to all categories of succession of States and were, in the view of the Commission, more concerned with codification as such, rather than with progressive development. The provisions of Part II, on the other hand, indicated how the general provisions of Part I might be applied in specific categories of succession and were mainly intended to offer guidance to States concerned, both in their negotiations and in the elaboration of national legislation in the absence of any relevant treaty. Thus, States concerned could agree among themselves to depart from the provisions in Part II if that would be more appropriate given the characteristics of the particular succession of States.

4. The Commission had considered it useful to devote a separate article, article 2, to the definition of the terms used, to facilitate understanding of the various provisions. It had also decided, for the sake of uniformity, not to alter the terms already defined by the two Vienna Conventions on the succession of States, but had had to provide two new definitions for the purposes of the current draft articles, one for the term "State concerned", and the other for the term "person concerned".

5. Article 1, entitled "Right to a nationality", was the key provision of Part I, indeed of the draft articles as a whole. It stated the basic principle from which many of the other draft articles were derived, namely, that every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, had the right to the nationality of at least one of the States concerned by the succession. The general principle laid down in article 15 of the Universal Declaration of Human Rights was thus applied in the exclusive context of a succession of States. The right embodied in article 1 in general terms was given more concrete form in subsequent provisions.

6. Article 3 provided the corollary to the right to a nationality laid down in article 1, in the form of the obligation of the States concerned to take all appropriate measures in order to prevent the occurrence of statelessness as a result of a succession of States. The scope of article 3 was limited to persons who were indeed nationals of the predecessor State before the succession, and did not encompass persons resident in the territory of the successor State who had been stateless under the regime of the predecessor State. The provision did not set out an obligation of result, but an obligation of conduct. The elimination of statelessness was the final result to be achieved by means of the application of the entire set of draft articles, in particular through coordinated action of States concerned.

7. The Commission was aware that there was often, in practice, a time lag between the date of the succession of States and the adoption of legislation or the conclusion of a treaty on the question of the nationality of persons concerned, and therefore considered it important to state, as a presumption, the principle that, on the date of the succession of States, the successor State attributed its nationality to the persons concerned who had thus far been habitual residents of the territory affected by such succession, in order to avoid such people being treated as stateless during that transitional period. That problem was addressed in article 4.

8. The draft articles were based on the principle that the legitimate interests of States and individuals should be taken into account in matters of nationality, and the Commission had therefore tried to find a satisfactory balance between the interests of both. In particular, there were situations in which the individual should have a voice in determining his or her nationality as a result of a succession of States. Article 10 was an important provision in that respect, stating in paragraph 1 that the States concerned should give consideration to the will of persons concerned whenever those persons were qualified to acquire the nationality of two or more States concerned. Paragraph 2 obliged each State concerned to grant the right to opt for its nationality to persons concerned who had an appropriate connection with

it if those persons would otherwise become stateless as a result of the succession.

9. Moreover, as stated in paragraph 9 of the commentary on article 10, the expression "appropriate connection" should be interpreted in a broader sense than the notion of "genuine link". The Commission believed that in such a case the objective of preventing statelessness should take precedence over the strict requirement of an effective nationality. Paragraphs 3 and 4 of article 10 obliged States concerned to respect the decision of any person who had exercised the right of option to which they were entitled by attributing its nationality to them or, if need be, withdrawing it from them. Lastly, under paragraph 5, States concerned should provide a reasonable time limit for the exercise of the rights set forth in paragraphs 1 and 2.

10. Elsewhere, article 13, entitled "Status of habitual residents", deserved special attention. Paragraph 1 of that article set forth the basic general rule according to which the status of habitual residents was not affected by a succession of States as such. On the other hand, paragraph 2 addressed the problem of habitual residents in the specific case where the succession of States was the result of events leading to the displacement of a large part of the population: its purpose was to ensure the effective restoration of their status to habitual residents as protected under paragraph 1. Naturally, the question addressed in article 13 was different from the question of whether or not the persons involved might retain their right of habitual residence in a State concerned if they acquired, following the succession of States, the nationality of another State concerned. While agreeing on the principle that a State concerned had the obligation to preserve the right of habitual residence of persons concerned who, following the succession, had become *ex lege* nationals of another State concerned, the members of the Commission had expressed widely differing views on the question of whether the same should apply in respect of habitual residents who had voluntarily become nationals of another State concerned. Given the lack of consensus, the Commission had decided not to include any provision on the matter in the draft articles, thus opting for a neutral solution.

11. Article 17, entitled "Exchange of information, consultation and negotiation", imposed certain obligations on States aimed at ensuring the effectiveness of the right to a nationality under article 1. Thus, paragraph 1 required States concerned, as a first step, to exchange information and consult in order to identify any detrimental effects on persons concerned with respect to their nationality and other connected issues regarding their status as a result of the succession of States. Under paragraph 2, States were required, when necessary, to seek a solution to eliminate or mitigate such detrimental effects by negotiation and, where appropriate, through the conclusion of an agreement.

12. He also drew the Committee members' attention to draft articles 11, 14 and 15, which contained general provisions protecting the rights of persons concerned. While those provisions clearly were not debatable, some members of the Commission had wondered whether they really belonged in the draft because of their general nature.

13. Article 18 contained two savings clauses. The first concerned the non-opposability to other States of a nationality acquired or retained in connection with a succession of States in disregard of the requirement of an effective link. The second safeguarded the right of States to treat persons concerned who had become stateless as a result of the succession of States as nationals of the State concerned whose nationality they would be entitled to acquire or retain, if such treatment was beneficial to those persons.

14. Part II of the draft articles was divided into four sections, each dealing with a particular type of succession: section 1 (Transfer of part of the territory), section 2 (Unification of States), section 3 (Dissolution of a State) and section 4 (Separation of part or parts of the territory). Following lengthy discussions, the Commission had decided provisionally not to insist on the inclusion in the draft of provisions concerning nationality where new States were created as a result of decolonization, but several members had felt that there was a gap in that area.

15. The provisions of each section identified in detail the categories of persons to whom a successor State should attribute its nationality and, where appropriate, those from whom the predecessor State should withdraw its nationality and those to whom a right of option should be granted. Since those rules were of a technical nature, they did not require any further clarification; however, Committee members were free to comment on them, either during the forthcoming discussion or in the observations of individual States, which the Commission and its Special Rapporteur awaited with interest.

16. Article 27, which was the last provision of the draft articles, had been included at a late stage and the decision as to its placement in the text had been left for the second reading. As in the case of the two Vienna Conventions on the Succession of States, the scope of the draft articles was limited to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations. Since the draft articles embodied certain

rights whose scope of application was broader than the topic at hand, the Commission had felt it desirable to reflect that fact in the opening phrase of article 27: "Without prejudice to the right to a nationality of persons concerned".

17. **Mr. Rotkirch** (Finland), speaking on behalf of the Nordic countries (Denmark, Iceland, Norway, Sweden and Finland), said he was satisfied with the way in which the new members of the Commission had organized their work and established a work programme up to the year 2001. The Nordic countries accepted the general outline proposed by the Commission for its work on the new topics of diplomatic protection and unilateral acts of States, as well as the approach taken to the topic of international liability for injurious consequences arising out of acts not prohibited by international law. Those countries should be able to provide, by 1 January 1998, written comments on the draft articles on State responsibility.

18. With respect to the draft articles on nationality of natural persons in relation to the succession of States, he did not doubt that, once the draft articles were finalized and adopted by the General Assembly, they would constitute a timely contribution to the development of international norms in that notoriously difficult field. In that connection, the Commission had left open the question of the final legal form to be given to the draft, even though the latter was presented in the form of a declaration. The Nordic countries had already stated their preference for a non-binding declaration that could be of immediate assistance to States dealing with problems of nationality in relation to the succession of States. Whereas the entry into force of a convention normally took a long time, a declaration of the General Assembly would provide an early yet authoritative response to the need for clear guidelines on the subject, without precluding the subsequent elaboration of a convention.

19. The Nordic countries welcomed the draft articles' consistent focus on human rights and the removal of certain inconsistencies and formulations that begged the question, such as principles (h) and (i), which had appeared in the preceding year's report. They were pleased to note that the Commission had not only reinforced the right to a nationality, but had also given it a precise scope and applicability by declaring, in article 1, that every individual who, on the date of the succession of States, had had the nationality of the predecessor State had the right to the nationality of at least one of the States concerned. The right to a nationality had already been incorporated in article 15 of the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights, in the Convention on the Rights of the Child and in the recently adopted European Convention on Nationality, which embodied the right of everyone to a nationality as one of the principles on which the States parties must base their domestic legislation on nationality. However, the right to a nationality had been viewed mainly as a positive formulation of the duty to avoid statelessness and not as a right to any particular nationality. The Nordic countries supported the Commission's reasoning, which went beyond that approach, building on the fact that, in cases of State succession, the States concerned were easily identified.

20. The words "at least" in article 1 left open the possibility of multiple nationality. As noted by the Commission, the idea was not to encourage a policy of dual or multiple nationality, but rather to recognize that, for the persons concerned, dual nationality was probably less detrimental than statelessness. The Nordic countries were pleased that the draft was neutral on that issue, since the determination of the circumstances in which multiple nationality might be desirable went beyond the scope of a general declaration.

21. The obligation of the States concerned, as laid down in article 17, to exchange information and consult in order to identify any detrimental effects of the succession of States, and to seek a solution to eliminate or mitigate such effects, was necessary to ensure the effectiveness of the right to a nationality, and article 17 should be read together with related articles in the draft. Nonetheless, it seemed advisable to add a sentence to article 17 stating explicitly that the States concerned were also obligated to ensure that the outcome of such negotiations complied with the principles and rules contained in the declaration.

22. The obligation of States concerned to take all appropriate measures to prevent statelessness, laid down in article 3, was another corollary of the right to a nationality. The deletion of the criterion of habitual residence, which had been included in the corresponding principle (b) in the preceding year's report, benefited both the text and the objective of preventing statelessness. Moreover, specific obligations aimed at preventing statelessness were laid down in several other articles, such as article 6 on the effective date of the attribution of nationality and the savings clauses contained in articles 7, 8 and 18.

23. Article 10, entitled "Respect for the will of persons concerned", article 11, entitled "Unity of a family", article 14, entitled "Non-discrimination", and article 15, entitled "Prohibition of arbitrary decisions concerning nationality issues", embodied principles and rules that were intended to protect the human rights of the persons concerned. Too often, treaty provisions or national citizenship laws which

were generous on paper were much less so in their practical application. It was therefore important expressly to prohibit arbitrary decisions on nationality issues, as article 15 had done, and to include such procedural safeguards as the requirement that decisions relating to nationality should be issued in writing and be open to effective administrative or judicial review. In addition, the reasons for such decisions should also be given in writing.

24. The Nordic countries fully endorsed the principle expressed in article 13, paragraph 1, that the status of persons concerned as habitual residents should not be affected by the succession of States. At the same time, they noted that the principle remained rather vague, since the more specific right of residence of habitual residents of the territory over which sovereignty was transferred to a successor State to remain in that State even if they had not acquired its nationality had been left out. While the Nordic countries recognized that the omission had been intentional, and had resulted from differences in opinion between members of the Commission, they would encourage the Commission to reconsider the issue.

25. Article 18, paragraph 1, reinstated a general principle of international law, already found in the Hague Convention of 1930, that laws and decisions of States in the area of nationality did not necessarily have international effect and were recognized by other States only insofar as they were consistent with international conventions and custom as well as the generally recognized principles of law. Paragraph 2, however, seemed to have a wider application in that it gave third States the right to treat stateless persons as nationals of a given State, even where statelessness could not be attributed to an act of the State but where the persons concerned had by their negligence contributed to the situation, provided that such treatment was beneficial to those persons. The Nordic countries were pleased that, in paragraph 8 of the commentary on that article, the Commission had specified that the provision was to be interpreted as meaning only that other States could extend to those persons a favourable treatment which would be granted to nationals of the State in question. Consequently, they could not, for example, deport such persons to that State. While supporting that provision, the Nordic countries wondered whether its content could be further clarified in the actual text of the draft.

26. The second part of the draft articles was intended to provide guidelines for States which were in the process of negotiating treaties or in enacting domestic legislation relating to succession of States. The Nordic countries welcomed the decision of the Commission to simplify the typology of the 1983 Vienna Convention on Succession of States by omitting the category of "newly independent States", while noting that one of the four categories of State succession would be applicable in any remaining case of decolonization in the future. The Commission had rightly found it useful to preserve the distinction between secession and dissolution of a State while ensuring that the provisions in both sections were identical.

27. Finally, the Nordic countries welcomed the inclusion of article 27, which limited the scope of application of the draft articles to succession of States occurring in conformity with international law. They understood that its final placement would be decided later.

28. **Mr. Bos** (Netherlands) said that because of lack of time, he would not read out the full text of his statement; it would, however, be distributed to members of the Committee.

29. His delegation welcomed the speed with which the Commission had completed the first reading of the draft articles on nationality in relation to the succession of States. That was no doubt due largely to the Special Rapporteur's clear and effective treatment of the subject, as well as to the new working methods adopted by the Commission, particularly the establishment of a working group which the Special Rapporteur could consult while preparing his reports.

30. As had been demonstrated in recent years, changes of sovereignty over territory were phenomena of current interest and the draft articles were therefore very useful. When changes of sovereignty occurred, many questions relating to nationality arose: Was people's nationality affected by the change of sovereignty? What were the rules of international law applicable in those cases and what could be left to the States directly concerned by the change of sovereignty? The effect of change of sovereignty on the nationality of the inhabitants of the territories concerned was one of the most difficult problems in the law of State succession.

31. Identifying as main objectives in the draft articles the protection of human rights and the need to strike a balance between those rights and the inherent right of a State to determine who were to be its citizens seemed to be the correct approach. The objectives concerning avoidance of cases of statelessness and the need to respect the will of the individual, while also valid, were of a general nature and to a certain extent went beyond the question of nationality in State succession.

32. His delegation noted that the Commission acknowledged the possibility of dual or multiple nationality

while providing rules for restricting the number of such cases, reflecting the needs of the times. The principle that no one could possess two nationalities was no longer absolute because, due to common roots or historic ties between nations and the greater mobility of people, it was not always possible to avoid cases of double or multiple nationality without injustice to the persons concerned. In addition, draft article 4 constituted a very useful saving clause: the presumption that acquisition of a new nationality automatically entailed loss of the former nationality was no longer generally respected.

33. With regard to article 11, his delegation stressed the importance of safeguards to ensure that the articles did not interfere with the well-established right to family life. The risk that families could be separated as a result of unintentional attribution of different nationalities to various members of a family should be eliminated.

34. Article 12, which dealt with the case of a child born after the succession of States to parents whose nationality, following the succession, had not been determined, provided that the child had the right to the nationality of the State concerned on whose territory that child was born. The granting of such nationality upon application to the appropriate authority in the manner prescribed by national law — another option besides the granting of nationality at birth by application of the Treaty of New York — seemed also to be covered by the article.

35. With regard to article 13, his delegation observed that in principle, change of nationality of persons habitually resident in the Netherlands would not affect their status as permanent residents, but might well affect their rights and duties. If, for example, such persons acquired the nationality of a State with which the Netherlands was at war, that could result in certain restrictions being imposed. If such persons acquired the nationality of a member State of the European Union, they would enjoy the regime applicable to nationals of member countries of the Union.

36. With regard to the final form which the draft articles should take given that they were meant to be part of the instruments dealing with State succession, his delegation thought it might be appropriate for them to have the same form as the two preceding texts. Although the latter clearly had not acquired the necessary number of ratifications to enter into force, that should not be an obstacle to putting the draft articles into the form of a convention. However, if the majority of Committee members thought that the draft articles should retain their current form as a declaration, his delegation could accept that as well. The existence of the text in itself was already a contribution to the development and codification of the rules of international law on the subject.

37. **Mrs. Dascalopoulou-Livada** (Greece) said that the draft articles should cover only those questions of nationality directly connected with the succession of States and that a title such as "Effects of the succession of States on the nationality of natural persons" or "Succession of States and nationality of natural persons" would be preferable. There should be no provisions such as those contained in draft articles 8, 9 and 12, which were not directly connected with the succession of States. Such questions were as a rule governed by the domestic legislation of States on nationality and there was no real reason for any intervention in that regard, as was partly recognized by the International Law Commission when it couched some rules — for example, draft articles 8 and 9 — in non-mandatory terms, using such expressions as "the former State may". Furthermore, draft article 18, which gave "other" — in other words, third — States the possibility of control over a question belonging to the exclusive competence of the successor State, was capable of creating problems. It contained elements of subjectivity where objectivity should prevail and should therefore be reconsidered.

38. One of the main deficiencies of the text requiring review was its failure to distinguish between obligations deriving from international law, which were obligatory for the successor State, and various other solutions that the successor State might or might not adopt on the basis of its domestic law. The latter solutions, however, could not but have a purely discretionary character. The draft suffered from confusion in that regard. More specifically, draft articles 20, 21, 22 (a) and 24 (a) followed — as far as the attribution of nationality was concerned — the solutions of international law, which were mandatory and applicable ex officio. Draft articles 22 (b) and 24 (b), on the other hand, had their source in domestic law and were discretionary rather than mandatory in nature. They were therefore always applicable only with the consent of the persons concerned.

39. The draft also provided for very wide rights of option without predetermined criteria. Such was the case of draft article 20, for example, by virtue of which entire populations were given unqualified rights of option by many States simultaneously. Another case was that of draft article 26, where the predecessor State had to give a right of option even to that part of its population that had not been affected by the succession. For that reason the question of the option should be re-examined and a distinction drawn between the right of option in accordance with international law, which was mandatory, and the right of option in accordance with

domestic law, which should be left to the discretion of the State.

40. Lastly, with regard to draft article 27, which established an exception to the rule that the draft articles applied only to a succession of States effected in conformity with international law, her delegation believed that there was no reason to depart in that respect from the relevant provisions of the two United Nations Conventions on the succession of States, which contained no such exception. Greece could not accept the result that might ensue from a situation where, for example, the aggressor State imposed its nationality on the victim population. Her delegation therefore strongly urged a return to the precedent of the United Nations Conventions.

41. **Mr. Ahamed** (India), after thanking Mr. Pellet, the Chairman of the International Law Commission, for his excellent introduction of the report, noted that for the first time the Commission had accomplished a complete study of a full set of draft articles and finalized them with commentaries in the same session. He therefore congratulated the Special Rapporteur on the topic, Mr. Mikulka, the members of the Drafting Committee and the Committee's Chairman, Mr. Rao.

42. His delegation considered that the draft articles were well structured, in that the preambular part offered the basic concepts on which the general principles in Part I, leading to their application to specific areas of State succession in Part II, had been developed. The Commission's aim had been to provide, on the one hand, for the right to nationality of the predecessor State at the time of succession and, on the other, for a corresponding obligation on the part of States to confer nationality upon natural persons. The idea was to prevent cases of statelessness, *inter alia*, by taking into consideration the humanitarian problems caused in certain cases of succession, such as the rights of the child where neither parent could be traced. Such conferring of nationality was to be carried out by enacting legislation, exercising the right of option and withdrawing prior nationality.

43. The draft articles also contained a special provision on "presumption" regarding the acquisition of the nationality of the successor State by persons maintaining habitual residence in that State. The draft articles also accorded the right of option to the nationality of the State with which the person concerned had an "appropriate connection", as opposed to the traditional approach of a "genuine" or "effective" link. However, third States had a right not to recognize the grant of nationality by a State to persons who in fact had no "effective" link with that State, particularly when it was beneficial to the persons concerned.

44. That was the orientation applied in Part II, in which four categories — the transfer of a part of a State, unification of States, dissolution of a State and separation of parts of a State — were envisaged. In cases of the dissolution of a State, or when part or parts of the territory of a State separated and formed one or more successor States, the draft articles envisaged the attribution of nationality by the successor State or States on the grounds of habitual residence or an appropriate legal connection with a constituent unit of the predecessor State that had become part of the successor State. The latter concept had been preferred to that of "secondary nationality", since its scope was broader. The draft articles, however, covered the effects only of succession of States occurring in conformity with international law and the Charter of the United Nations.

45. His delegation considered that the draft articles constituted a noteworthy contribution to codifying the law on the succession of States. The concept of habitual residence was a positive feature of the draft and the Commission was to be congratulated on maintaining a balanced approach by treating the presumption of nationality in respect of habitual residence as arising only in the absence of any other prevailing provision or subject to agreement between States. Another positive contribution was the use of the concept of "appropriate connection", in preference to the test of "genuine link". Recognition of nationality of the State in whose territory a child was born — *jus soli* — redressed the humanitarian problems arising from the non-traceability or death of the parents, so that nationality could not pass to the child under the normal rule of *jus sanguinis*. The draft articles were realistic in taking account both of the limits that international law could impose on States and of the freedom of action that States exercised in matters of nationality. They were also flexible, in that States were left the freedom to implement Part I in any other manner than that indicated in Part II, so long as they observed the general principles contained in Part I. The Commission had been right not to fix any normative hierarchy between general principles and specific application. States should therefore consider the draft articles from a political perspective and provide comments, so that the Commission could proceed to a meaningful second reading.

46. **Mr. Hillgenberg** (Germany) said that the fact that the Commission had submitted a comprehensive set of draft articles only four years after the topic of State succession and its impact on the nationality of natural and legal persons was included in its agenda demonstrated both the particular relevance of the topic in contemporary international law and the remarkable accomplishment of Mr. Mikulka, the Special Rapporteur. The first preambular paragraph indicated the

raison d'être of the draft declaration; there was no doubt that the collapse of the Soviet Union and the disintegration of the former Yugoslavia had indeed created special problems and that the draft declaration before the Committee had been inspired by those recent events. The unification of Germany in 1990 was a case apart since under the German nationality law there had always been only one German nationality so that the citizens of the former German Democratic Republic had always been Germans.

47. The German Government was in full agreement with the structure and main objectives of the draft articles and shared the two concerns they addressed: concern for human rights and concern to avoid statelessness. Indeed, the German Government had always believed that although nationality was essentially government by internal law it must take account of the limits and parameters set by international law. That was the very principle enunciated in article 1 of the Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws, which provided that even though it was for each State to determine under its own law who its nationals were, such law should be recognized by other States only insofar as it was consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality.

48. The obligation to avoid cases of statelessness in the event of the succession of States was set out in article 10 of the 1961 Convention on the Reduction of Statelessness, and also in the recent European Convention on Nationality adopted by the Council of Europe. Article 1 of the Commission's draft declaration did not set out an obligation of result but rather one of conduct. Indeed, in cases of State succession where there was more than one successor State, an obligation of result would lead to situations of dual or multiple nationality on a large scale.

49. The question of whether there was a right to a particular nationality had been much debated. As was well known, article 15 of the Universal Declaration of Human Rights had been the subject of various interpretations in that regard. However, where there was succession of States it was possible to determine more precisely which State or States should grant nationality. Article 1 of the draft declaration, which gave every individual directly affected by a succession of States "the right to the nationality of at least one of the States concerned", thus mirrored that reality. In that connection, the German Government had noted that even though the Commission recognized the possibility of dual or multiple nationality, as the words "at least" showed, nevertheless it was not its intention to encourage it. Like other Governments, the German Government pursued a policy of avoiding cases of dual or multiple nationality in accordance with a number of international obligations.

50. To consider the right to a nationality as a human right was all the more justified in that nationality was often a prerequisite for exercising other rights, in particular the right to participate in the political and public life of a State. Thus, the German Government shared the concern for the rights of the individual enshrined in article 10 of the draft declaration. Article 14, on non-discrimination, was also of the utmost importance: in that connection, he noted that article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination required States to guarantee the civil rights of everyone, and in particular the right to nationality, without distinction as to race, colour, or national or ethnic origin. The German Government agreed that, as the Special Rapporteur had suggested in his report, it was preferable not to include an illustrative list of such criteria. Article 14 did not address the question of whether a State concerned might use certain criteria for enlarging the circle of individuals entitled to acquire its nationality. In such a case, as in all others, the will of the individual concerned must be respected.

51. Draft article 16, on procedures relating to nationality issues, was of particular practical relevance. The Commission might want to include "reasonable fees" among the procedural guarantees, as the European Convention on Nationality did.

52. The German Government found the form proposed by the Commission, namely, a draft declaration consisting of articles with commentaries, to be entirely appropriate.

53. **Mr. Manongi** (United Republic of Tanzania) commended the Commission on its draft preamble and articles on nationality, which gave operational meaning to the right of every individual to a nationality as prescribed in article 15 of the Universal Declaration of Human Rights. He indicated that he would confine his remarks to draft article 4 and chapter X of the report of the International Law Commission.

54. It was regrettable that draft article 4 provided for a presumption of nationality in the event of total or partial succession of States only for persons resident in the State concerned. He wondered if that was the only way to achieve the desired goal of solving the problem of the lag between the succession of States and the adoption of legislation or the conclusion of a treaty between the States concerned, whatever the case might be, on the question of the nationality of the persons concerned. Although it was rebuttable, the presumption was unwarranted because it was too broad, and if it needed to be kept it would have to be

made more precise. As the principal goal was to avoid statelessness, there could be a presumption of continuity of nationality or the acquisition of the nationality of one of the States concerned that would be based not on the sole criterion of habitual residence but on more factual criteria, particularly the universal criteria in international law of *jus soli* and *jus sanguinis*. Indeed, it was difficult to see why those two criteria had not been accommodated.

55. Two elements must also be taken into consideration. They were, first of all, the right of every State to a legal relationship with those persons who had a genuine link with it. In that connection, mere residence was not sufficient to guarantee loyalty. Secondly, an individual's right to a nationality must be guaranteed. That could be done by broadening the scope of article 4 to include general and accepted principles of international law or a specific provision prohibiting the States concerned from taking measures that would render stateless any person who had the nationality of the predecessor State and who, as stated in draft article 10, paragraph 2, had an appropriate connection with the State concerned.

56. Another problem with regard to draft article 4 was that it did not reflect the near-sacred character of nationality. At a time when the mobility of capital and labour was blurring boundaries, residence was no longer a sufficient criterion of loyalty for attribution of a nationality. In certain cases, persons might have enjoyed dual nationality under the legislation of the predecessor State, which should not necessarily be imposed on the successor State. Furthermore, in countries such as the United Republic of Tanzania, whose arbitrarily drawn boundaries had been inherited from the past and where the idea of habitual residence might be subjective and even difficult to determine, the concept might have unexpected ramifications.

57. The premise of the Commission's draft text was that nationality was essentially governed by national law, an attribute of State sovereignty. That principle must be maintained at all costs.

58. With regard to chapter X of the Commission's report, his delegation supported the Commission's work programme for the remainder of the quinquennium. Regarding methods of work, however, the desire to avoid reopening the discussion of issues already considered seemed somewhat rigid. That approach was particularly hard to understand because the Commission's work programme for the next quinquennium was not only progressive but also repetitive. On the other hand, his delegation was in favour of the suggestion that the fixed sequence of rotation by geographical region should be adjusted so that every region would have an opportunity to assume the chairmanship during a different year of each quinquennium. It hoped that the Commission would take the necessary steps to that end.

59. His delegation did not see how the proposal regarding the duration of the Commission's session could be accepted without additional information on how the work of the Commission had been constrained by the fact that its forty-ninth session had lasted only 10 weeks. By contrast, his delegation welcomed the Commission's review of the list of organizations which cooperated with it. As a member of the Asian-African Legal Consultative Committee, his delegation was particularly pleased to note that that association and the African Society of International Law had been included in the list of intergovernmental organizations that cooperated with the Commission. In that connection, he noted that, at its forty-eighth session in 1996, the Commission had given thought to revising some aspects of its Statute, which were to be considered at its forty-ninth session with a view to submitting recommendations to the General Assembly for the review of its Statute to coincide with the Commission's fiftieth anniversary. His delegation hoped that that objective remained feasible.

60. **Mr. Nick** (Croatia) said that he would limit his remarks to the question of nationality in relation to the succession of States, which was of particular interest to his country. While there was certainly no reason to encourage dual nationality or multi-nationality, they were nonetheless a realistic solution in certain cases, and the draft articles could develop the question. As the only member of the Sixth Committee that was also a member of the European Commission for Democracy through Law (Venice Commission), his delegation wished to draw the Sixth Committee's attention to the Venice Declaration on the Consequences of State Succession for the Nationality of Natural Persons, which it could use as a model. That was particularly true in the case of the Commission's draft article 16 on procedures relating to nationality issues. His delegation preferred the text of paragraph 3 of the Venice Declaration, which read: "Any deprivation, withdrawal or refusal to confer nationality shall be subject to an effective remedy".

61. His delegation also wished to stress that the terminology of draft article 18 was not fully consistent with the definitions given in draft article 2. It agreed with the representative of Greece that the slightest ambiguity in draft article 27 could be dangerous.

62. In conclusion, he said that his delegation would support the adoption of a convention rather than a

declaration, provided that a sufficient number of States acceded to the instrument.

63. **Mr. Hamid** (Pakistan) said that his Government would submit its comments on the draft articles on State responsibility by the deadline of 1 January 1998.

64. Injurious consequences arising out of acts not prohibited by international law must entail international liability. However, in view of the multifarious activities carried out by States within their borders, it might be difficult to draw up an exhaustive list of activities involving a transboundary risk. His delegation would therefore not be adverse to the inclusion of an illustrative list. On the other hand, it would find it difficult to accept the qualification of "transboundary harm" as "significant", a term which could be controversial, particularly as there was no provision for a binding dispute settlement mechanism. In the absence of such a mechanism, the adjective should be deleted. In the event of harm, the aggrieved State should be entitled to compensation by the State from which the harm emanated.

65. Reservations to treaties were a useful means of obtaining the accession of hesitant States. While the Vienna regime contained the basic elements in that connection, his delegation was not opposed to effort to eliminate lacunae or any ambiguities. On the contrary, in that regard, it did not distinguish between human rights treaties and other treaties.

66. Regarding nationality in relation to the succession of States, while it was certainly necessary to prevent statelessness, the sovereignty of States must not be undermined; the conferral of nationality should remain the sole prerogative to the State concerned. His delegation was satisfied with the Commission's decisions to give the text the form of a General Assembly declaration and to consider the question of natural persons separately from that of legal persons.

67. Regarding the Commission's methods of work, he welcomed the closer cooperation between the Commission and other bodies, particularly the Asian-African Legal Consultative Committee. The relationship between the Commission and the Sixth Committee must be strengthened, and the Sixth Committee should receive the Commission's documents prior to and not during its session. The duration of the Commission's sessions should be commensurate with its workload.

68. **Mr. Caflisch** (Observer for Switzerland) said that the draft articles prepared by the Commission on nationality in relation to the succession of States were well thought out, and that he endorsed the five main principles underlying them.

69. The first principle was to prevent new cases of statelessness from being generated by the succession of States. The second principle was that the solutions proposed should be based on the existence of "appropriate links" between the State and the individual. If such links could be found for nearly all the persons concerned, the application of that principle would generate hardly any new cases of statelessness. It could, however, result in a multiplicity of nationalities. That realization led to a third principle, which was highlighted in the commentaries: the neutrality of the draft articles with regard to the phenomenon of multiple nationality. A fourth principle was that the forced attribution of nationality should be avoided as far as possible. The fifth and final principle was that, in regulating the effects of State succession in the field of nationality, as in other fields, distinctions should be drawn among different factual situations.

70. He could also endorse the idea of dividing the draft articles into two parts, the first part embodying general rules and the second part containing non-peremptory rules applicable to each of the four specific situations of succession. If draft article 19, which was at the beginning of Part II, was interpreted *a contrario*, then Part I of the draft would consist of peremptory provisions. That implied that the Commission regarded the provision in Part I as reflecting existing customary law and, moreover, as being peremptory rules (*jus cogens*). It would probably be desirable to review all the articles in Part I of the draft to determine whether they all actually fell into that category; there was room for doubt on that score. Draft articles 9 (Loss of nationality upon the voluntary acquisition of the nationality of another State) and 8 (Renunciation of the nationality of another State as a condition for attribution of nationality), for instance, were clearly non-peremptory; he wondered, too, whether the rule attributing nationality to a child who had acquired no nationality other than that of the State in whose territory he was born was indeed of a peremptory nature.

71. The distinction between codified customary rules and rules that were merely treaty-bound was particularly important in the context of the succession of States. Insofar as succession created one or more new actors at the international level, they would be bound only by provisions reflecting customary rules, hence those contained in Part I of the draft articles. A different situation occurred with respect to States existing prior to succession; if the draft took the form of a treaty, and those States acceded to it, they would be bound by the text as a whole. In other words, different rules would apply to the different actors involved in the same case of succession. It appeared, therefore, that

the Commission had done well to present its draft in the form of a declaration rather than a treaty.

72. With regard to the text of the draft articles, the comments which he was about to make would be supplemented by the written observations of his Government. Under draft article 6, attribution of nationality took effect on the date of succession; in other words, it was generally retroactive. Such retroactivity was also stipulated where a person acquired a nationality by exercising the right of option, but only if, in the absence of retroactivity, the person concerned would be rendered temporarily stateless. He wondered whether that condition should not be extended to all cases of attribution of nationality, in other words, to article 6 as a whole, rather than being limited to situations involving the exercise of the right of option. The proposed change would have the advantage of limiting the effect of retroactivity to what was strictly necessary.

73. Draft article 13 stipulated that the status of persons concerned as habitual residents would not be affected by the succession of States. The Commission's mandate, however, as reflected in the title of the draft, dealt with the nationality of natural persons in relation to the succession of States; it did not cover their status as residents, however desirable it might be to limit massive, forced population transfers as much as possible.

74. Draft article 14 prohibited States from "discriminating on any ground" in the attribution or maintenance of nationality or in granting the right of option. As explained in the Commission's commentary, that prohibition referred to discrimination on the grounds of sex, religion, race, origin or language; however, in order to dispel the *a contrario* notion that any form of discrimination not included in such a list would be lawful, the Commission proposed to prohibit discrimination on any ground. He wondered, however, whether such a formulation was not too broad. It might, for example, prohibit any distinction, where the nationality of a successor State was being acquired, between individuals residing in the territory of that State and other persons. To put it in different terms, if the principle of non-discrimination was retained in its current wording, the use of criteria for the attribution of nationality could be characterized as a discriminatory practice and could thus violate article 14 — hence the need for a clearer, or narrower, formulation of that provision.

75. Article 18, paragraph 2 allowed third States to treat persons who had become stateless as the result of the succession of States as nationals of the State whose nationality they would be entitled to acquire or retain. Paragraph (6) of the commentary on draft article 18 stated that paragraph 2 of the article was intended to correct situations resulting from discriminatory legislation or arbitrary decisions, which were prohibited by draft articles 14 and 15. He would have preferred for that clarification to appear in the text itself of article 18, paragraph 2, which would thus refer to articles 14 and 15.

76. Draft article 20 governed cases involving a transfer of only part of the territory of a State. It provided that the successor State should attribute its nationality to persons who had their habitual residence in the transferred territory. At the same time, it guaranteed the right of such persons to choose the nationality of the predecessor State. Granting such a right of option would undoubtedly ensure respect for the will of he persons to whom that right was granted, but it would impose a heavy burden on the predecessor State. Moreover, it could, in the transferred territory, create a large population having the nationality of the predecessor State, which did not appear to be desirable. For that reason, he, like some members of the Commission, believed that the right of option to be granted by the predecessor State should be limited to persons who had retained links with the predecessor State. He wondered, moreover, whether for the sake of symmetry the successor State should not also be required to offer a right of option to nationals of the predecessor State who did not reside in the transferred territory, if they had links with that territory. Lastly, draft article 20 offered nothing to persons concerned who resided in the territory of third States. It would be desirable to enable such persons to acquire the nationality of the successor State if they had links with it.

77. With regard to draft article 22, concerning the dissolution of a State, he wondered, without meaning to affect the substance of the provision, whether it might not be better to merge the situations envisaged in subparagraph (b) (I) and (ii); the same consideration applied to article 24, subparagraph (b), concerning cases of secession.

The meeting rose at 5.30 p.m.

United Nations A/C.6/52/SR.19

General Assembly
Fifty-second session

Official Records

Distr.: General
24 November 1997

Original: English

Sixth Committee

Summary record of the 19th meeting
Held at Headquarters, New York, on Friday, 31 October 1997, at 10 a.m.

Chairman: Mr. Tomka ..... (Slovakia)

Contents

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session (*continued*)

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

97-82448 (E)

The meeting was called to order at 10.10 a.m.

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session (*continued*) (A/52/10)

1. **Mr. Leanza** (Italy) welcomed the significant progress made by the International Law Commission on nationality in relation to the succession of States, its careful analysis of reservations to treaties and its establishment of two working groups on diplomatic protection and unilateral acts of States. On the general question of the Commission's mandate, he said that the codification and progressive development of international law were issues that should be kept separate. Codification was not intended to create rules of international law but to reflect and coordinate existing rules. However, it was not limited to reproducing in written form the principles and rules of international law; it generally fulfilled an interpretative function. Otherwise, codification would be of little practical importance, since States would be able to challenge whether the codified provisions conformed with those in force. The Sixth Committee, as a body made up of Member States, was the appropriate forum for ensuring that codification corresponded with custom. It was for States, as the originators of customary rules, to ensure that codification included their actions or omissions as characterized by the objective factor of repetition in time and space and the subjective factor of awareness of their obligatory nature. In short, they exercised control based on the two factors that formed the customary standard, *diuturnitas* and *opinio juris sive necessitatis*.

2. The progressive development of law, on the other hand, established new standards on the basis of existing law. It was a process of creating new rules of international law or adapting existing rules to the new needs of the international community, and necessarily required the agreement of those at whom the international legal standards were aimed, namely, States. The agreement of States was always required, whether the new standards were the crystallization of a customary provision still being formed or were entirely new ones for which the practice and *opinio juris sive necessitatis* had not yet been established.

3. The link between the work of the experts in the Commission and the positions taken by delegations in the Sixth Committee was not without its drawbacks, but it had interesting repercussions on the establishment of the rules of international law. Firstly, it kept the members of the Commission from losing sight of State positions and thus taking too academic an approach. Secondly, and much more importantly, the involvement of delegations in the process of codification and progressive development allowed them to express their opinion on the content of the rules of law being considered. That opinion was none other than the *opinio juris sive necessitatis* he had already mentioned, which could be expressed simultaneously by all members of the international community. Thus, Governments quickly became familiar with newly developed concepts, which helped to facilitate their eventual adoption in one form or another. The psychological effect produced by discussions in the Sixth Committee was not to be underestimated. He agreed with the Chairman of the Commission on the need for closer and more effective cooperation between the Commission and the Sixth Committee, so that results better reflected the legal conscience of the international community, and on the means suggested by the Chairman of the Commission for improving that cooperation.

4. On the question of nationality in relation to the succession of States (A/52/10, chap. IV), he said that States had exclusive responsibility for granting or taking away nationality. However, while other subjects could not challenge the criteria for granting nationality, they were not obliged to accept the individual consequences of decisions. Decisions taken by one State with regard to an individual were not opposable by other States, unless the criteria followed justified an extension of the rights derived from a personal qualification: citizenship, in relation to State succession, should reflect an actual relationship. International law was aimed at reducing conflict of nationalities, where a person had several nationalities or none at all, in order to better protect human rights, particularly the right to a nationality. The effects of a change in sovereignty on the nationality of the population of the territory involved was, as the Special Rapporteur had pointed out in his excellent third report (A/CN.4/480 and Add.1), one of the most difficult problems of the law of succession of States. Codification in that area was therefore necessary, since nationality, despite being primarily governed by domestic standards, was of ever greater interest to the international public order.

5. He expressed his appreciation for the Commission's efforts to find a balance between the rights and interests of individuals and the sovereign competence of States to grant citizenship, and its efforts to avoid statelessness and guarantee continuity between different nationalities and recognize the right of each individual to choose a nationality, whilst avoiding concepts of the obligation to attribute nationality, particularly in order to safeguard minorities. The right to nationality in cases of State succession was established in article 1 of the draft articles, which represented a fundamental standard and a great improvement

in the international protection of human rights, as well as an improvement on the principle contained in article 15 of the Universal Declaration of Human Rights. The importance of that principle was underlined by the inclusion of the provisions in article 3, on the prevention of statelessness, and article 4, on presumption of nationality. The obligation on States to take all appropriate measures to avoid statelessness was the corollary of the right of those concerned to a nationality. The qualified presumption of nationality on the basis of habitual residence was a further application of the principle of the need for a genuine link between the State and the individual in the area of naturalization. Article 15, on the arbitrary deprivation of nationality, was yet another instrument to protect the right of every person to a nationality.

6. He shared the Commission's view on the role to be played by respect for the will of the persons concerned. Article 10 reflected a fairly well-established domestic practice, particularly in cases where a new State was formed and territory ceded, which gave priority to residents or the original inhabitants of the territory in question. He had found of special interest the provisions on protecting the unity of a family (article 11), the right of a child to have a nationality (article 12) and the status of habitual residents (article 13), and the provisions that prohibited any form of discrimination (article 14). Article 11 would go beyond any international conventions or domestic provisions on the subject, by changing the nationality of a family at the same time as the nationality of the head of the family. That solution involved, in most cases, discrimination against women, who were treated as subordinate to men. Article 12 reinforced article 24 of the International Covenant on Civil and Political Rights and article 7 of the Convention on the Rights of the Child, to guarantee, in the most difficult cases, a minimum level of certainty in determining the nationality of children involved in the succession of States. The protection of minorities, dealt with in article 14, was a sensitive matter, as pointed out by the Permanent International Court of Justice in the controversy on the acquisition of Polish nationality. He agreed with the Commission's approach not to include a list of circumstances that could give rise to discrimination, but rather to opt for phrasing which prohibited all forms of discrimination without reference to their cause.

7. Article 18 touched on one of the key roles of international law with regard to nationality, namely, that of defining the jurisdiction of States in that area. The provision was consistent with the overall logical and legal approach of the draft articles, setting a limit on the opposability of nationality to other States, consisting of the existence of a genuine link between the citizen and the State. That link was not simply a formality, but an expression of shared experience, interests and feelings that determined the reciprocal rights and duties of the State and the citizen.

8. As in the hypothesis of a territorial occupation, international law should typically be concerned with ensuring that the legal descriptions corresponded, as far as possible, with reality. It was true that the Commission had not dealt with the substance of the criteria for a genuine link, but to do so would have been beyond its mandate. In any case, international jurisprudence on the Nottebohm case and the Flegenheimer case could help to clarify the legal interpretation.

9. Part II of the draft articles listed the specific categories of succession of States, generally following the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. The categories of succession chosen by the Commission were exhaustive, and he endorsed the decision not to include decolonization, partly because of uncertainty in differentiating it from other categories, and partly because of the limited number of cases of decolonization. In practice, the categories of succession were difficult to identify, which might reduce the effectiveness of the draft articles concerned. From a legal point of view, the proposals concerning the effects of specific categories of succession on nationality were, in most cases, a true reflection of international practice or were the logical consequence, as in the case of article 22, of the dissolution of a State.

10. He agreed with the decision to adopt as the main criterion for identifying subjects to whom successor States must grant nationality the criterion of habitual residence rather than citizenship. Although habitual residence was less used in practice, it appeared to be more specific than citizenship, and was in line with the trend to enhance effectiveness in international law.

11. **Mr. Chen Shiqiou** (China) said that the issue of nationality was mainly governed by national law. Rapid changes in the world situation and the emergence of new countries made the issue of nationality in relation to the succession of States a matter of some urgency. Determining the requirements for the acquisition of nationality remained a sovereign right of States, but it was not a right without limits. A State must take due account of international law and international realities. It was therefore essential that an appropriate balance should be struck between the sovereign rights of a State and the limits set by international law. That

balance had important implications for international stability and the maintenance of international peace and security.

12. The core issue addressed by the draft articles was the possible effects of State succession on the nationality of natural persons. In the light of that mandate, entrusted to the International Law Commission by the General Assembly, the last article in the current draft adopted on first reading was not relevant or sufficiently specific. The same could be said of other parts of the draft. For example, the sixth preambular paragraph and article 27 had implications that were clearly extraneous to the core issue. He hoped that, at its second reading, the Commission would strictly adhere to the mandate given to it by the General Assembly.

13. In part II, four categories of succession of States were specified, but the category of decolonization, a major issue in international relations and international law, was omitted. The 1978 and 1983 Vienna Conventions both contained detailed provisions for newly independent countries as a separate category in the succession of States. The work of decolonization was not completely over yet. In the current draft, the general provisions in part I applied to decolonization, but newly independent countries were excluded from the specific categories of State succession in part II. He hoped that the concerns expressed on that point by a number of members of the Commission would be taken into account in the second reading of the draft articles.

14. Conflict over nationality in relation to the succession of States could be both passive and active. The draft articles had concentrated on the former, through consideration of the important issue of statelessness, but had neglected to provide for the latter, leaving it to States to decide on policy with regard to dual and multiple nationality. Active nationality conflict posed many problems for individuals and States, relating to such matters as taxation, loyalty, social security benefits, military service and the administration and protection of natural persons. Those problems often resulted in disputes and conflicts between States, such as those which China had peacefully resolved after years of concerted efforts with countries of South-East Asia. The fact that the current draft articles underscored the obligation of States to respect the will of the natural person and his or her right of option with regard to nationality was likely to generate active nationality conflict. The Commission should take due account of that risk at the second reading of the draft articles.

15. **Ms. Skrk** (Slovenia) said that the decision to give the draft articles on nationality of natural persons in relation to the succession of States the form of a declaratory instrument was regrettable. Her delegation continued to advocate the adoption of a legally binding instrument, such as a convention, which would complete the Commission's work on the codification of State succession issues in a legally appropriate manner. In that regard, the relevant Vienna Conventions on State succession should not be ignored, particularly in view of the role they had played in recent State succession cases.

16. The future declaration should be carefully drafted to strike the right balance between the legitimate interests of States and individuals. Although that point had been made in the preamble, the draft articles should be critically re-examined to ensure that they reflected the same principle.

17. The premise of the Commission's work on the nationality of persons and the succession of States had been that nationality was governed by national law, international private and comparative law and international law. While international law had not intervened in a State's sovereign right to decide to whom it should grant nationality, human rights law had moved rather further in that direction in recent decades.

18. Although the Commission's primary concern had been protection of the human rights of individuals concerned, care should be taken to ensure that in preparing the draft articles more stringent standards were not imposed on States affected by State succession than would be imposed on all States by the principle of sovereign equality. Moreover, States affected by succession were bound to respect the right of an individual to a nationality and to respect the will of the person concerned when choosing a nationality.

19. Draft articles 3, 4 and 10 of the text were central to the issue. With regard to article 4, the presumption of nationality, based on the criterion of the habitual residence of affected persons, was an appropriate means of preventing statelessness, but raised two legal issues requiring further examination.

20. Firstly, the Commission needed to find a balance between two legislative approaches: the granting of nationality on the basis of territorial origin, or on the basis of parental origin. The Commission appeared to have accorded greater importance to the former approach, so that the draft articles tended to promote cases of dual and multiple nationality, particularly where the right of option was not based on cooperation or exchange of information on nationality matters between States.

21. With regard to the right of option in cases where persons might qualify to acquire more than one nationality, her delegation believed that past practice had been based on international agreement, rather than on the internal legislation of the State concerned, as in the Commission's

current text. Since national legislation could not regulate the acquisition of the nationality of another State, the term "free choice of nationality" would be more appropriate and would distinguish between the new option and the practice that pertained in post-war treaties and in the case of some newly independent States. Moreover, the term "appropriate legal connection" (article 22 (b)) was too vague and should be replaced with the term "effective link".

22. The principle of the unity of a family laid down in draft article 11 should be upheld, but its provisions should not be interpreted as meaning that all members of a family remaining together had to have the same nationality, since that would contravene the principle of respect for the will of persons concerned. However, a State could consider the unity of a family as an effective link for granting nationality to family members under more favourable terms.

23. The Commission should not exceed its mandate by extending the provisions of the current draft to refugees and other categories of persons requiring humanitarian protection as a result of State succession. Moreover, the unclear wording of draft article 13, on the status of habitual residents, should be amended in accordance with the principle that State succession should not affect the acquired rights of natural and juridical persons.

24. Articles 14 and 15 of the text met the criteria of contemporary human rights law, but the wording of article 14 should specifically refer to prohibition of discrimination on the grounds of race, colour, descent, national or ethnic origin and religion.

25. With regard to the Commission's position that specific categories of the succession of States could also apply *mutatis mutandis* apply to newly independent States which were currently dependent territories, her delegation believed that the text should include a provision that would explicitly respond in an appropriate legal manner to cases of newly independent States.

26. With regard to the regulation of nationality following dissolution of a State, the Commission's decision to adopt the criterion of habitual residence of persons affected and its prescription of the right of option had not taken account of recent practice in Central and Eastern Europe. There, the criterion had often been the continuity of nationality of former federal units that had become independent States. To prevent statelessness, permanent residents had been granted the option to acquire the new nationality within a certain time-frame.

27. With regard to the prevention of statelessness, the Special Rapporteur's proposal in his third report to combine the criteria of habitual residence and the principle of continuity of "secondary" nationality was more in keeping with contemporary practice and realities than the Commission's reliance on habitual residence alone. As for the issue of legal persons, their nationality in relation to State succession might have consequences for individuals' property rights and should therefore be included as one of the practical problems for the Commission's consideration.

28. **Mr. Beranek** (Czech Republic) said that the decision to present the draft articles on nationality of natural persons in relation to the succession of States in the form of a draft declaration was perhaps the most practical method of providing States involved in a succession with a set of legal principles and recommendations for drafting their nationality legislation. A declaration would give States the flexibility to include a broader spectrum of issues than would be included in a convention and would obviate the need for discussion of whether its provisions could be invoked with regard to a State that had not participated in its adoption. If adopted by consensus, the declaration might even have a greater impact on State behaviour than a convention that awaited ratification.

29. In emphasizing the rights and interests of individuals, the Commission had departed considerably from the traditional view of nationality law as a primary domain of internal law. That approach was perfectly acceptable, so long as a balance was struck between the interests of States and those of individuals.

30. His delegation agreed too with the general structure of the draft articles, provided that the States concerned could decide, by explicit or implicit agreement, on a different method for applying the provisions of part I of the text in their particular case of succession.

31. The right of every person who had the nationality of a predecessor State to the nationality of at least one of the successor States involved was a sound basis for the draft as a whole, but care should be taken to underline the fact that that right referred to the context of succession of States, rather than the right to a nationality *in abstracto*.

32. Following the dissolution of Czechoslovakia, the two successor States had eliminated the risk of statelessness by adopting national legislation for the *ex lege* attribution of nationality along the lines of the current draft articles 1 and 3, although their conditions for optional acquisition of nationality and dual nationality policies differed considerably. The Czech Republic had acted quickly in that instance, to avoid the kind of uncertainty to which article 5 of the draft referred.

33. The Czech delegation questioned the wisdom of including article 4 in part I of the text, and believed that that provision might cause more problems than it resolved.

34. First, the provision had no general application. It made no sense to invoke it in the case of the unification of States, where the principle that all persons concerned acquired the nationality of the successor State, as provided for in draft article 21, rendered the distinction based on the place of residence within or outside the territory concerned useless.

35. Secondly, he had serious doubts about the function of such a presumption in the case of the transfer of part of a territory. Since no transfer could take place lawfully except by agreement between the States concerned, such an agreement would obviously contain provisions on the nationality of persons having their habitual residence in the territory to be transferred. The presumption had no meaning in such a case. If the treaty provided for a change of nationality, the situation was clear; it was also clear, however, if the treaty was silent on the question – the persons concerned retained their nationality. A case in point was the border treaty between his country and Slovakia, which provided for an exchange of certain territories between the two States, but did not provide for any automatic change of nationality as a result.

36. Lastly, the presumption envisaged in draft article 4 might not be helpful even in the case of separation from a federal State of one of its units. It was unclear why the citizenship of such a unit, recognized under the federal constitution, should be disregarded, and habitual residence treated as the only relevant criterion. The citizenship of a unit of a federation was a reliable criterion for resolving the problem of nationality for those residing both inside and outside the territory concerned. On the other hand, while the presumption of nationality based on habitual residence might be applied easily to those living in the territory concerned, it did not help to clarify the situation of those living abroad. In the case of dissolution of a federation, the presumption could even create confusion. The matter should therefore be given further consideration.

37. It was essential to maintain a balance between provisions that ensured respect for the will of persons concerned (draft article 10) and those that ensured certain prerogatives of States (draft articles 7 to 9). He supported the inclusion of draft articles 11 (Unity of a family) and 12 (Child born after the succession of States), which were fully in keeping with the aims of the Convention on the Rights of the Child. Articles 13 (Status of habitual residents), 14 (Non-discrimination), 15 (Prohibition of arbitrary decisions concerning nationality issues) and 16 (Procedures relating to nationality issues) provided guarantees of respect for the rights of individuals which should be included in the text.

38. With regard to the principle of non-discrimination, the Czech nationality law had been criticized by some international bodies because it made having a clean criminal record a requirement for the optional acquisition of Czech nationality. As that requirement applied only to the optional acquisition of Czech nationality by persons who had already acquired Slovak nationality, it could not in itself be a cause of statelessness. Nevertheless, the rules relating to the application of that requirement had been changed, and nearly all cases had been resolved to the satisfaction of the applicants. In his view, a distinction should be made between a situation in which that requirement would prevent the person concerned from acquiring the nationality of at least one of the successor States, and a situation in which it was among the conditions for naturalization.

39. Draft article 17 (Exchange of information, consultation and negotiation) contained a reasonably formulated provision on negotiation and agreement. Agreement, however, was not an indispensable means of solving nationality problems. Legislative measures adopted by one State with full knowledge of the content of the legislation of the other State involved in a succession might be sufficient to prevent such succession from having detrimental effects on nationality.

40. He had no difficulty in supporting draft article 18 (Other States). Paragraph 1 of the article reflected the general principle of non-opposability to third States of nationality granted without the existence of an effective link between the State and the person concerned; it would prevent the person concerned from being treated as a de facto stateless person, and was fully justified in doing so. Paragraph 2, which focused on the situation of persons who would become stateless in spite of the provisions of the draft article, was aimed at preserving the delicate balance between the interests of States which could be involved in a situation of that kind; he therefore considered it acceptable.

41. Part II of the draft articles, in which the general principles contained in part I were applied to different categories of State succession, appeared to be intended mainly as a guide for States entering into negotiations in order to resolve nationality issues. In view of the complex nature of those provisions, he wished to reserve his position on the draft articles concerned until a later stage.

42. **Sir Franklin Berman** (United Kingdom) said that it was important not to lose sight of the significance of the decision in 1947 to establish the Commission as a permanent organ of the United Nations whose membership was to be

composed of independent experts elected by the General Assembly. The remarkable legacy of that experiment could be measured in part by the Commission's record of completed projects.

43. Turning to the draft articles on nationality in relation to the succession of States (A/52/10, chap. IV), he said that there was an obvious need for clear and humane rules on the subject, and that the concern for human rights embodied in the Commission's draft was the correct modern approach. As his country's past practice appeared to be largely in conformity with what the draft prescribed, he anticipated being able to support it, while reserving the possibility of making comments on points of detail.

44. He welcomed the Preliminary Conclusions of the Commission on the topic "Reservations to treaties" (A/52/10, chap. V) contained in paragraph 157 of the report. The Commission had performed the valuable function of integrating the general components of the law of treaties while respecting the particular considerations applying to some areas of international relations and the special treaty mechanisms that had been built up in some of those areas. He took note with satisfaction of the Commission's observation in the eighth preliminary conclusion regarding the powers of treaty monitoring bodies, and supported the Commission's recommendations addressed to States parties and to States negotiating future normative treaties.

45. Questions had been raised concerning the tenth and twelfth preliminary conclusions. The twelfth preliminary conclusion allowed for the development of specific rules and practices in the regional context. It was his understanding that such a provision was not an invitation to fragment the unity of international law governing reservations to multilateral treaties, but rather a sensible recognition of the possibility of regional diversity in respect of the monitoring function.

46. The tenth preliminary conclusion dealt with the situation between States parties after a finding that a reservation formulated by one of them was inadmissible. He agreed with the Commission's conclusion that the rejection of a reservation as inadmissible conferred some responsibility on the reserving State to respond. On the basis of his country's current treaty practice, he believed that there should be scope for further exchanges between objecting and reserving States with a view to eliminating the incompatibility. One of the disadvantages of the rule concerning tacit acceptance after 12 months contained in article 20, paragraph 5, of the Vienna Convention on the Law of Treaties was that it tended to freeze what should remain an open transactional situation. That was one of the reasons why his Government did not regard the article in question as a rule of customary international law. He looked forward to the Commission's further considerations on the legal effect of impermissible reservations and objections to them.

47. With regard to "State responsibility" (A/52/10, chap. VI), his Government was preparing substantial written observations which would deal with the issues highlighted in paragraph 30 of the report.

48. As to "International liability for injurious consequences arising out of acts not prohibited by international law" (A/52/10, chap. VII), he reiterated his delegation's position concerning the undesirability of further work on the liability aspect of the topic. While he understood that "international liability" had been the core issue of the topic as originally conceived, that did not mean that it should be retained for further work 25 years later, in the light of the meagre understanding reached in that time. Further work on the topic should be confined to the prevention aspect alone.

49. Turning to the topic of diplomatic protection (A/52/10, chap. VIII), he expressed broad satisfaction with the Working Group's proposals. The scope of the topic would be confined to the codification of secondary rules, in other words, the basis, conditions, modalities and consequences of diplomatic protection, and would avoid the question of responsibility for injury to aliens. Having no opinion, for the time being, as to whether functional protection exercised by international organizations fell within the scope of the topic, he could go along with the Commission's proposal to study the relationship between the protection exercised by States and functional protection exercised by international organizations and to report back at an early stage.

50. On the topic of unilateral acts of States (A/52/10, chap. IX), while the results set out in the Working Group's report were interesting, he believed that the topic needed to be refined further in order to be manageable. The proposed subject of study, as set out in paragraphs 199 and 200, was extremely broad, even if it omitted certain categories of unilateral acts. He wondered, for example, about the wisdom of including "recognition", which was in itself a vast and complex subject. It was to be hoped that the Special Rapporteur would be able to produce a more focused preliminary study within the following year, identifying the main practical issues to be examined.

51. Lastly, with regard to organizational matters, the Commission was to be commended for the improvements made to its report. The 1997 report was handy, usable, economical and well-focused. He wondered, however, whether it might be possible in the future for chapters II and

III to be prepared and translated as a matter of priority and circulated to States in advance of the report as a whole. That might greatly facilitate the preparation of the debate at the second part of the Commission's session, which would not end until August 1998. While the idea of holding a split session was indeed an experiment, that did not invalidate the outcome. He was confident that more flexible arrangements, including split sessions, offered real prospects for expediting the Commission's work.

52. **Mr. Andrews** (United States of America) said that the International Law Commission had made a major contribution to the growth and development of the role of international law in the post-war era. Its success, however, had not come easily nor had it always been as productive as it had been over the past two years. At one time it had been seen in some government and academic circles as a remote institution, at some remove from Governments' main concerns. It had sometimes continued to work on topics for many years, in the face of sceptical questions or even outright opposition from a growing number of Governments.

53. The Commission had recently appeared to take on a new lease on life. It had completed some long-running projects and laid the groundwork for the efficient completion of others. It had given serious study to its own programme and methods of work, making some useful improvements, and had sought more energetic and effective dialogue with Governments and the Committee. Much remained to be done, however, by all the parties concerned. His country had shown its support by providing concrete responses to the Commission's questions and to the Special Rapporteurs' questionnaires, with extensive comment on international liability for injurious consequences arising out of acts not prohibited by international law, and would work to provide thorough and timely responses on other topics. In the past week it had submitted a set of detailed comments regarding the draft articles on State responsibility. The comments stressed four areas in which it believed that the draft articles required significant revision on second reading, namely: the continued inclusion of the concept of international crimes, an idea that had no useful role in the law of State responsibility; unacceptable limitations on the duty to compensate, including the duty to pay interest, where States violated their obligations; unwarranted limits on the ability of States to take proportionate countermeasures in appropriate circumstances; and the excessively detailed and unrealistic dispute settlement provisions.

54. With regard to nationality in relation to State succession, his country strongly supported the thrust of the draft articles, which recognized the important human rights dimensions of nationality. The draft articles emphasized the importance of avoiding statelessness and of giving effect to the choices of affected individuals. They were clear and well organized and the commentary was thoughtful, giving a clear explanation of the texts. His country would submit more considered and detailed comments on the articles by the deadline of 1 January 1998.

55. His country would speak later regarding the work being done on reservations to treaties. It shared the Special Rapporteur's view that the provisions of the Vienna Convention on the Law of Treaties did not need revision and that the rules generally applicable to reservations applied with equal authority in the case of human rights and other normative treaties. The United States also looked forward to the fruits of the Commission's continued work on diplomatic protection and on the legal effects of unilateral acts, which were both of relatively clear scope and in which focused and efficient work by the Commission could help clarify the existing legal situation.

56. **Mr. Perrin de Brichambaut** (France) said that the International Law Commission continued to do indispensable and incomparable work. On the question of nationality in relation to the succession of States, his delegation supported the central intention of the draft articles, as contained in draft article 1 regarding the right to a nationality. The reaffirmation of that right constituted a real advance in international law, acting as a reminder that political change should not be allowed to have an unacceptable impact on individuals. The greater attention devoted to statelessness in the draft articles was also welcome. It was right that the draft text should draw attention to the various ways of dealing with the consequences of the main principle, since national legislation on nationality differed and the right of each country to select its own options should be respected. The same adaptability was apparent in the choices with regard to multiple nationality, drawing a distinction between the right to nationality of persons affected by mass displacement and that of the right of residence of those same persons in a specific place. It was harder to decide whether the question of unity of families and other human rights questions, such as non-discrimination, should also be covered.

57. The second part of the text, although equally flexible, required further consideration by both States and the Commission. It might therefore be more appropriate for the draft text to be adopted as a declaration rather than as a convention, although a decision on the matter should be deferred until detailed reactions from States had been received.

58. Diplomatic protection was a basic principle of international law, but it was not always honoured. For that reason it was particularly important that the Commission was considering the topic. The Working Group on Diplomatic Protection had been right to limit consideration to diplomatic protection *stricto sensu* and to address only indirect harm (harm caused to natural or legal persons whose case was taken up by a State) and not direct harm (harm caused directly to the State). With regard to diplomatic protection for the agents of international organizations, he said that the "functional protection" extended by international organizations to their agents was comparable to that exercised by States and the Commission should therefore continue to include it in the topic. The Commission had also been right to limit its study to the codification of secondary rules and not to address the specific content of the international legal obligations that had been violated. It was precisely because the Commission's draft articles on State responsibility were not limited to secondary rules that France had expressed serious reservations regarding them. It was too soon to decide whether the draft articles on diplomatic protection should take the form of a convention or of guidelines, although the latter alternative would have the advantage of not putting the exercise on too formal a footing.

59. With regard to unilateral acts of States, the Commission's work had been most useful. States often acted unilaterally but often it was hard to know what the consequences of such acts would be. States did not necessarily wish to confer on such acts consequences identical to those resulting from what might be termed a "classic" legal engagement. The Commission should make it a priority to distinguish between unilateral acts of States creating legal situations that were opposable in conformity with international law and those that were not. If the effect of the former was to create, recognize, safeguard or modify rights, obligations or legal situations, it was hard to see the point of unilateral acts without such effects.

60. His delegation believed that unilateral acts by international organizations ought to be excluded from the study, although they could be the subject of a study on their own. Indeed, the Commission itself had catered for the possibility of considering the issue of decisions adopted by international organizations. The Commission should also take account of the interaction between unilateral acts of States and custom, since such acts could contribute to the formation of customary law. It should, in addition, study the relationship between unilateral acts and treaties. Some acts, such as those concerning accession, denunciation, reservations, interpretative declarations or withdrawal, were in fact governed by the law of treaties and therefore required no study. Others, however, were not, even though they were in treaty form, and should therefore be studied.

61. Some comparison with the law of treaties was essential. The withdrawal of a unilateral declaration, for example, was generally examined to see whether the declaration had created rights for a third party or not. The analogy with the law of treaties was particularly interesting: article 37, paragraph 2, of the Vienna Convention on the Law of Treaties of 1969 stated that when a right had arisen for a third State it could not be revoked or modified if it was established that the right had been intended not to be revocable or subject to modification without the consent of the third State. He wondered whether it could therefore be said, *mutatis mutandis*, that when a unilateral act, like a unilateral declaration, was clearly intended to create a right for a third party the originating State could not revoke that right at its own discretion. It was an issue that the Commission should consider. It was too soon to say whether a convention or guidelines should be the outcome of the exercise.

62. With regard to reservations to treaties, he welcomed the fact that the Commission considered that, as his country had said the previous year, the reservations regime in the Vienna Convention of 1969 was so flexible as to make it adaptable to all forms of treaty, including human rights treaties. His delegation believed that the permissibility of reservations depended on the object and purpose of the treaty concerned.

63. The establishment of monitoring mechanisms by many human rights treaties posed particular problems with regard to the role of such mechanisms in relation to the permissibility of reservations. Although such problems had not been envisaged when the Vienna Convention of 1969 had been drawn up, it would not be impossible to incorporate such mechanisms, which could be most useful and effective. Monitoring bodies should not, however, be able to control the permissibility of reservations except when that was expressly stipulated. The common will of States to grant such bodies competence should appear in the text of a treaty, as illustrated by the European system of human rights protection. Where such mechanisms were lacking, it was for the State making the reservation to draw the consequences of the incompatibility of the reservation with the object and purpose of the treaty, just as it was for the State objecting to the reservation to draw the consequences of its decision regarding the treaty between itself and the State making the reservation. A monitoring body had a jurisdictional or similar status entirely dependent on a given treaty. It could not have competence other than that explicitly conferred on them by the States parties. If States wished it to have the

competence to assess or determine the permissibility of a reservation, there should be clauses in the multilateral treaties, particularly human rights treaties, to say so. His delegation would, therefore, find it difficult to subscribe to the fifth preliminary conclusion. Where treaties were silent, it was hard to see why or how monitoring bodies established under those treaties could comment upon or express recommendations with regard to the admissibility of reservations by States. The Commission itself seemed to share that view, given its suggestion, in the seventh preliminary conclusion, that protocols should be elaborated to existing treaties if States sought to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation. He reiterated that it was for States alone to modify a treaty or to elaborate a protocol to set up a monitoring mechanism, or else to react to a reservation that they considered incompatible with the object and purpose of a given treaty.

64. On the important topic of State responsibility France would submit written comments.

65. He welcomed the improvement in the Commission's working methods. It was for the Committee, in its turn, to reconsider its relations with the Commission, as the Commission's Chairman had said. In his delegation's view the Committee should adopt a more proactive stance, which would enable real dialogue to take place between the two bodies. Since the Commission's work related directly to the concerns of States, the latter should give the Commission guidelines, through the Committee. In that connection, his country hoped that the improved working methods would not put in question the location of Geneva as the normal meeting place of the Commission.

66. It was essential to research and propose other topics for consideration. One such was the scope and the legal consequences of resolutions adopted by international organizations and their role in the formation of international law. The Commission could also usefully undertake a specific study of countermeasures, rather than including that topic in its draft articles on State responsibility.

The meeting rose at 12.10 p.m.